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No. 1894

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE MARITIME INVESTMENT COMPANY (a Corporation), Claimant of the S. S. "F. A. KILBURN," a Steam Schooner,

Appellant,

vs.

BASILIOS HANOS,

Appellee.

APOSTLES.

Upon Appeal from the United States District Court for the Northern District of California.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 1894

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the United States Circuit Court of Appeals for the Ninth Circuit.

BASILIOS HANOS,

Libelant and Appellee,

vs.

S. S. "F. A. KILBURN,"

Defendant and Appellant.

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant and Appellant.

Stipulation and Order Enlarging Time to July 3d, 1910, to File Record on Appeal.

It is stipulated and consented that the time of appellants for docketing this case, and filing the Apostles thereof with the clerk of the above-entitled court, may be enlarged and extended to and including the 3rd day of July, 1910.

F. P. BULL,
HENRY B. LISTER,
Proctors for Appellee.

Pursuant to the foregoing stipulation, and good cause appearing therefor:

IT IS HEREBY ORDERED that the time for appellant to docket this case and file the apostles upon the appeal be, and the same is hereby enlarged and extended to and including the 3rd day of July, 1910.

Dated at San Francisco, June ——, 1910.

MORROW,
Judge.

[Endorsed]: No. 14,059. In the United States Circuit Court of Appeals for the Ninth Circuit. Basilios Hanos, Libelant and Appellee vs. S. S. "F. A. Kilburn," Defendant and Appellant, Maritime Investment Co., Claimant and Appellant. Stipulation and Order Enlarging Time to July 3rd, 1910, to File Record on Appeal. Filed Jun. 17, 1910. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

BASILIOS HANOS,

Libelant and Appellee,

vs.

S. S. "F. A. KILBURN,"

Defendant and Appellant.

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant and Appellant.

Stipulation and Order Enlarging Time to July 18. 1910, to File Record on Appeal.

It is stipulated and consented that the time of appellants for docketing this case, and filing the Apostles thereof with the clerk of the above-entitled court, may be enlarged and extended to and including the 18th day of July, 1910.

FRANKLIN P. BULL and
HENRY B. LISTER,
Proctors for Appellee.

Pursuant to the foregoing stipulation, and good cause appearing therefor:

IT IS HEREBY ORDERED, that the time for appellant to docket this case and file the apostles upon the appeal be, and the same is hereby enlarged and extended to and including the 18th day of July, 1910.

Dated at San Francisco, June 29th, 1910.

WM. W. MORROW,

Judge.

[Endorsed]: No. 14,059. United States Circuit Court of Appeals, Ninth Circuit. Basilios Hanos, Libelant and Appellee, vs. S. S. "F. A. Kilburn," Defendant and Appellant, Maritime Investment Company Claimant and Appellant. Stipulation and Order Enlarging Time to July 18, 1910, to File Record on Appeal. Filed Jun. 30, 1910. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

BASILIOS HANOS,

Libelant and Appellee,

vs.

S. S. "F. A. KILBURN,"

Defendant and Appellant.

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant and Appellant.

Order Enlarging Time to August 17, 1910, to File Record on Appeal.

Good cause appearing therefor, it is hereby ordered, that the time for appellant to docket this case and file the apostles upon the appeal be, and the same

is hereby enlarged and extended to and including the 17th day of August, 1910.

Dated at San Francisco, July 18, 1910.

MORROW,

Judge.

[Endorsed]: United States Circuit Court of Appeals, Ninth Circuit. Basilios Hanos, Plaintiff, vs. S. S. "F. A. Kilburn," Defendant and Appellant. Maritime Investment Company, Claimant and Appellant. Order Extending Time to File Apostles on Appeal. Filed Jul. 18, 1910. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

BASILIOS HANOS,

Libelant and Appellee,

vs.

S. S. "F. A. KILBURN,"

Defendant and Appellant.

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant and Appellant.

Order Enlarging Time to August 20, 1910, to File Record on Appeal.

Good cause appearing therefor, it is hereby ordered, that the time for appellant to docket this case and file the apostles upon the appeal be, and the same is hereby enlarged and extended to and including the 20th day of August, 1910.

Dated at San Francisco, Aug. 17, 1910.

WM. E. VAN FLEET,

Judge.

[Endorsed]: No. 14,059. Circuit Court of Appeals, Ninth Circuit. Basilios Hanos, Libelant and Appellee, vs. S. S. "F. A. Kilburn," Defendant and Appellant, Maritime Investment Co., Claimant and Appellant. Order Extending Time. Filed Aug. 17, 1910. F. D. Monckton, Clerk.

No. 1894. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time. Refiled Aug. 20, 1910. F. D. Monckton, Clerk.

[Notice of Filing Apostles.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 14,059.

BASILIOS HANOS,

Libelant and Appellee,

vs.

S. S. "F. A. KILBURN,"

Defendant and Appellant,

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant and Appellant.

You and each of you, will please take notice, and you are hereby notified, that the appellants above named have filed with the clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, California, the Apostles on said appeal.

To Basilios Hanos, Libelant and Appellee, and Messrs. Franklin P. Bull and Henry B. Lister, Proctors for Libelant.

Dated August 25, 1910.

SAMUEL ROSENHEIM,
BERNARD SILVERSTEIN,
Proctors for Appellant.

Service of the within Notice of Filing of Apostles is hereby admitted this 26 day of August, 1910.

BULL & LISTER,
Proctors for Libelant.

[Endorsed]: No. 1,894. United States Circuit Court of Appeals for the Ninth Circuit. Basilios Hanos, Libelant and Appellee, vs. S. S. "F. A. Kilburn," Defendant and Appellant, Maritime Investment Company (a Corporation), Claimant and Appellant. Notice of Filing of Apostles. Filed Aug. 26, 1910. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 1894.

BASILIOS HANOS,
Libelant and Respondent,
vs.
Steamship "E. A. KILBURN,"
Defendant and Appellant,
MARITIME INVESTMENT COMPANY (a Corporation),
Claimant and Appellant.

Stipulation [Omitting Claimant's Original Exhibits 1, 2 and 3 from Printed Record].

It is hereby stipulated and agreed, that original Exhibits 1, 2 and 3, being the certificates of inspection introduced as evidence at the trial hereof, may be received and considered in connection with the transcript of the proceedings, pursuant to Rule 14, Subdivision 5 of the Rules of the above-entitled court, and that copies of said exhibits need not be made or printed by the Clerk of the above-entitled court.

SAMUEL ROSENHEIM,
Proctor for Appellant.
HENRY B. LISTER,
Attorneys for Libelant and Respondent.

[Endorsed]: No. 1894. U. S. Circuit Court, Ninth Circuit. Basilios Hanos, Libelant and Respondent, vs. Steamship "F. A. Kilburn," etc., Defendant and Appellant, Maritime Investment Company (a Corporation), Defendant and Appellant. Filed Sep. 13, 1910. F. D. Monckton, Clerk.

In the District Court of the United States, in and for the Northern District of California.

No. 14,059.

BASILIOS HANOS,
Libelant,
vs.
The "F. A. KILBURN," a Steam Schooner,
Defendant.
THE MARITIME INVESTMENT COMPANY (a Corporation),
Claimant.

Praecipe for Apostles on Appeal.

Charles P. Brown, Esq., Clerk of the United States District Court, Postoffice Bldg., City.

Dear Sir: You will please make up for transcript on appeal to the United States Circuit Court of Appeals in the above-entitled action, the documents hereinafter mentioned, to wit:

1. Statement as required by subdivision 1 Rule 4 of Admiralty;
2. The libel filed in the above-entitled matter;
3. Exceptions to the libel;
4. Answer of the claimant filed herein;
5. Testimony taken at the trial herein;
6. Testimony taken by deposition and read as evidence in the trial herein;
7. The opinion of the Court herein;
8. The final decree herein;
9. Notice of appeal and the assignment of errors.

Respectfully,
SAMUEL ROSENHEIM,
W. H. HUTTON,
BERNARD SILVERSTEIN.
Proctors for Claimant and Appellant.

Due service and receipt of a copy of the within praecipe for Apostles on Appeal is hereby admitted this 3d day of June, 1910.

FRANKLIN P. BULL,
HENRY B. LISTER,
Proctors for Libellant.

[Endorsed]: Filed Jun. 4, 1910. Chas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

No. 14,059.

BASILIOS HANOS,

Libelant,

vs.

The S. S. "F. A. KILBURN," a Steam Schooner, Her Tackle, Apparel and Furniture,

Respondent.

THE MARITIME INVESTMENT COMPANY (a Corporation),

Claimant.

Statement of Clerk U. S. District Court.

PARTIES.

Libellant: BASILIOS HANOS.

Respondent: The steam schooner, S. S. "F. A. KILBURN," her tackle, apparel and furniture, etc.

Claimants: THE MARITIME INVESTMENT COMPANY (a Corporation).

PROCTORS.

FRANKLIN P. BULL, Esq., and HENRY B. LISTER, Esq., for Libellant.

SAMUEL ROSENHEIM, Esq., and H. W. HUTTON, Esq., for Respondent and Claimant.

July 31, 1909. Filed verified Libel, for personal injuries. Issued Monition for attachment of the S. S. "F. A. Kilburn," a steam schooner, which said Moni-

tion was afterwards on the 3d day of August, 1909, returned and filed with the following return of the United States Marshal endorsed thereon:

"In obedience to the within Monition, I attached the S. S. 'F. A. Kilburn,' a steam schooner, therein described on the 31st day of July, 1909, and have given due notice to all persons claiming the same that this Court will, on the 17th day of August, 1909 (if that day be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I served a copy of the within Monition on John A. McLeod, second officer of the S. S. 'F. A. Kilburn,' a steam schooner, on board said schooner, at San Francisco, Cal., this 31st day of July, 1909. C. T. Elliott; U. S. Marshal. By T. F. Kiernan, Office Deputy Marshal. San Francisco, Cal., July 31st, 1909.

C. T. ELLIOTT,
United States Marshal.
By T. F. Kiernan.
Office Deputy."

August, 1909. Filed Stipulation for release of steam schooner, "F. A. Kilburn," in the sum of $10,000.00, with Marshal A. Frank and Carl G. Brown, as sureties. Filed Claim of the Maritime Investment Company.

August 26. Filed Claimant's Exceptions to Libel.

September 4. The Exceptions of Claimant, to the Libel herein, this day came on for hearing before the Honorable John J. De Haven, Judge of the District Court of the United States in and for the Northern District of California, and after the hearing of the same, Ordered that said Exceptions be overruled.

September 29. Filed Answer of the Maritime Investment Company.

December 22. The above-entitled cause was heard on this day in the District Court of the United States in and for the Northern District of California, at the City and County of San Francisco, before the Honorable John J. De Haven, Judge of said Court. Which said cause was, after the several hearings, submitted to the Judge for consideration and decision, on the 23d day of December, 1909.

Filed Depositions on behalf of libellant, of J. Constantine and John Malikis.

1910

April 27. The Honorable John J. De Haven, Judge of said Court, this day entered an order that the submission of this case, on December 23d, 1909, be set aside, and that the same be restored to the calendar for reargument and submission.

May 9. In accordance with the order entered on April 27th, 1910, the above-entitled cause was this day reargued and submitted to the Honorable George Donworth, presiding in said District Court.

10. Filed Memorandum of Decision, which was this day rendered by said George Donworth, Judge as aforesaid.

Filed Decree.

19. Filed Notice of Appeal.

28 Filed Supersedeas Bond on Appeal.

Filed Assignment of Errors.

29. Filed Testimony taken in open court.

[Libel.]

In the United States District Court, for the Northern District of California.

IN ADMIRALTY.

BASILIOS HANOS,

Libelant,

vs.

S. S. "F. A. KILBURN," a Steam Schooner,

Defendant.

To the Hon. JOHN J. DE HAVEN of the United States District Court, in a Cause for Damages, Civil and Maritime.

The libel of Basilios Hanos, a seaman, respectfully shows:

That the defendant is an American vessel, and that she now is in the Bay of San Francisco, State of California, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

That on or about the 19th day of January, 1908, the libelant was duly employed as a fireman on the defendant.

That at said time the boilers on said defendant were in an unsafe, dangerous and defective condition and had been so prior to the defendant leaving a port at which said boilers could have been repaired.

That their dangerous condition either was known or might have been known to the chief engineer, and the matter of the defendant by the exercise of due care, but that the defendant by the negligence of

said master and chief engineer, went to sea on the 19th day of January, 1908, with said boilers in a dangerous and defective condition.

That on said date and while the said defendant was on the high seas, and while the libelant was performing his duties as a fireman, one of said boilers, by reason of its defective condition, exploded and scalded the libelant so severely that he has entirely lost the use of his hands and will never again be able to use the same.

That libelant is a married man and the father of three minor children of tender years, all of whom are dependent on libelant for their support, maintenance and education.

That the libelant is a ward of this Honorable Court and is entirely without funds to pay his costs herein.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

That libelant was able to earn and did earn a monthly salary of Fifty-five ($55.00) Dollars per month and board and lodging found, of the value of seventy-five ($.75) cents per day, and an extra amount of Twenty ($20.00) Dollars per month for extra labor, all of which earning capacity has been lost to plaintiff.

That by reason of the injuries set forth above, the libelant has been compelled to expend in hospital fees and doctor's bills the sum of One Hundred and Fifty ($150.00) Dollars, to his damage in all in the sum of Twenty-five Thousand One Hundred and Fifty ($25,150.00) Dollars, and costs of suit.

Wherefore, the libelant prays judgment against the defendant in the sum of Twenty-five Thousand One hundred and Fifty ($25,150.00) Dollars, together with his costs herein, and that process may issue and the defendant seized and held to answer, and for such further and necessary relief as, may be meet and proper in the premises.

his
BASILIOS X HANOS,
mark

Libelant.

Witness:

HENRY B. LISTER,
JOHN W. THREDUE.

Basilios Hanos, being unable to write, made his mark and I signed his name hereto at his request and my own name as witness thereto.

HENRY B. LISTER.

Subscribed and sworn to before me this 28th day of July, 1909.

[Seal] HENRY B. LISTER.
Notary Public in and for the City and County of San Francisco, State of California.

FRANKLIN P. BULL,
HENRY B. LISTER,
Proctors for Libelant.

[Endorsed]: Filed Jul. 31, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

In the United States District Court for the Northern District of California.

IN ADMIRALTY.

BASILIOS HANOS,

Libelant,

vs.

S. S. "F. A. KILBURN," a Steam Schooner,

Defendant.

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant.

Exceptions to Libel.

To the Hon. JOHN J. DE HAVEN, of the United States District Court:

The Maritime Investment Company, a corporation, claimant herein, files the following exceptions to the Libel of the libelant and excepts to said libel:

(1) For that it does not appear upon the face of said libel that libelant is entitled to any relief at the hands of this court in said cause;

(2) For that it appears upon the face of said Libel that if the boilers on the said defendant, steamship "F. A. Kilburn," were in an unsafe, dangerous or defective condition, that it was known to the libelant, and he assumed the risks of the said alleged unsafe, dangerous and defective condition of said boilers and whatever results that may have followed therefrom;

(3) For that it appears upon the face of said libel that libelant's cause of action, if any he has, has

been barred by subdivision 3 of sec. 340 of the Code of Civil Procedure of the State of California;

(4) For that it cannot be ascertained from the face of said Libel in what respect it is claimed that the boilers on the said defendant, steamer "F. A. Kilburn," were in an unsafe, dangerous and defective condition;

(5) For that it cannot be ascertained from the face of said libel what the alleged defective condition of the said boiler was, which it is claimed caused it to explode and scald the libelant;

(6) For that it cannot be ascertained from the face of said libel what the nature of the alleged injuries which libelant claimed to have sustained, were;

(7) For that it cannot be ascertained from the face of said Libel in what manner libelant computes the amount of damages claimed to have been sustained by him.

Wherefore claimant prays that these exceptions may be sustained, and the said libel dismissed with costs.

SAMUEL ROSENHEIM,
Proctor for Claimant.

Service of the within Exceptions to Libel is hereby admitted this 26th day of August, 1909.

F. P. BULL,
Proctor for Libelant.

[Endorsed]: Filed Aug. 26, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

At a stated term of the District Court of the United States of America, in and for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, on Saturday, the 4th day of September, in the year of our Lord one thousand nine hundred and nine. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 14,059.

BASILIOS HANOS

vs.

S. S. "F. A. KILBURN," etc.

Order Overruling Exceptions to Libel.

The exceptions to the Libel herein this day came on for hearing and after hearing Mr. Silverstein, Esqr., proctor for defendant, by the Court ordered that said Exceptions be, and they are hereby, overruled and further ordered that said defendant be, and it is hereby allowed ten days in which to prepare and file its answer to said libel.

[Answer.]

In the District Court of the United States, in and for the Northern District of California.

IN ADMIRALTY.

BASILIOS HANOS,

Libellant,

vs.

S. S. "F. A. KILBURN," a Steam Schooner,

Defendant.

THE MARITIME INVESTMENT COMPANY (a Corporation),

Claimant.

To the Honorable J. J. DE HAVEN, Judge of said Court:

The answer of The Maritime Investment Company, claimant in said proceeding, to the libel of Basilios Hanos, respectfully shows as follows:

I.

Claimant denies that on or about the 19th day of January, 1908, or on about any other day or at any time, the boilers, or any boiler, of the steamer "F. A. Kilburn" were in an unsafe or dangerous condition, or in a defective condition, or had been prior to the said vessel leaving any port, and it further denies that the boiler or any boiler, on said vessel, were, or was at said or any time, in an unsafe, or dangerous, or defective condition, either before or after leaving any port.

II.

It further denies that any alleged, or any dangerous condition of any boiler, or the boilers of said vessel, was known or might have been known to the chief engineer or the Master of the vessel, or to this claimant, or to anyone else, by the exercise of due or any care, or at all, and it further denies that the chief engineer or the Master of said vessel, or anyone else, knew, or could have known of any alleged dangerous condition of any boiler or boilers on said vessel.

III.

It further denies that by reason of the negligence of the Master and chief engineer of the steamer "F. A. Kilburn," or this claimant, or anyone else, the said steamer went to sea on the 19th day of January, 1908, or on any other day, with her boilers or any thereof, in a dangerous or defective condition.

IV.

It denies that on or about the 19th day of January, 1908, or on or about any other day, one of the boilers of the steamer, "F. A. Kilburn," exploded, by reason of its defective condition, or by reason of any other cause, or at all.

V.

It denies that by reason of any explosion of any boiler, on the steamer, "F. A. Kilburn," or by reason of any defective condition of any boiler on said steamer, the libellant was severely, or at all scalded, or entirely or otherwise lost the use of his hands or either thereof.

VI.

Answering unto the allegation that libelant will never be able to use his hands again, claimant avers that it has no information upon the subject, and it therefore calls for proof thereof.

VII.

Answering unto the allegation that libellant is a married man, claimant avers that it has no information upon said subject, and it therefore demands proof thereof. And it further avers that it has no information as to whether libellant is the father of three or any children of tender or other years, or whether said or any children are dependent on the libellant for their or any of their support, maintenance and education, and it therefore calls for proof upon all of the said matters.

VIII.

Claimant further alleges that it has no information as to whether the libellant spent One Hundred and Fifty ($150) or any other sum of money, in hospital fees and doctor's bills, or either or both thereof, and it therefore calls for proof of the same.

IX.

Claimant denies that by reason of any act or omission of it, or anyone in its employ, or the Master, or the chief engineer of the steamer "F. A. Kilburn," libellant has been damaged in the sum of Twenty-five Thousand One Hundred and Fifty Dollars ($25,150), or in any sum, and he further denies that libellant has been damaged at all by reason of any defective or dangerous condition of the or any boiler of the steamer "F. A. Kilburn" at any time

whatever. And as to whether libellant was at any time damaged by reason of any cause whatever, it alleges that it had no information on said subject and it therefore calls for proof thereof.

X.

Claimant alleges that libellant's injuries in the libel described, if any there was, was caused by the fault and negligence of the libellant himself.

XI.

Claimant further alleges that on or about the 19th day of January, 1908, a tube in one of the boilers of the said steamer "F. A. Kilburn" split open, and allowed steam, which was then in said boiler, to escape; that said tube split by reason of a latent defect in said tube; that it was impossible to discover by any inspection that could be made of said boiler said defect, and such defect was never at any time prior to the said tube so splitting discovered. That the said tube had been carefully inspected prior to its being placed in said boiler, and continually thereafter the said boilers were inspected by the engineers on said steamer and by inspectors appointed by the United States Government for that purpose, and that all the diligence that human skill or the experience of men skilled in the work of inspecting boilers on steam vessels was constantly used by claimant to discover defects, if any, in the boilers of the said vessel, "F. A. Kilburn," and no defects were or could be discovered therein prior to the accident to the libellant. Claimant further alleges that the said tube that so split was placed in said boiler by persons skilled in that class of work, and of extraordin-

ary diligence.

XII.

Claimant further alleges that libellant's alleged cause of action is barred by the provisions of section 813, and subdivision 3 of section 340 of the Code of Civil Procedure of the State of California.

XIII.

Claimant further alleges that libellant has been guilty of gross laches of filing this libel herein, in this, that his alleged injuries are claimed by him to have been received on or about the 19th day of January, 1908, and his libel was not filed until the 31st day of July, 1909. That said vessel was under charter to "Crescent Wharf & Warehouse Co.," a corporation, at the time of the receipt of the said alleged injuries and libellant was in its employ.

XIV.

Claimant further alleges that it is a corporation organized and existing under and by virtue of the laws of the State of California, and it admits the jurisdiction of this Honorable Court in the premises, but it denies that the premises mentioned and set forth in the libel herein are true.

XV.

Claimant further alleges that at the date and time of the alleged accident to libellant, it was not the owner of the S. S. "F. A. Kilburn," a steam schooner, defendant herein, nor in the possession thereof; that claimant came into possession of the said defendant "F. A. Kilburn" by deed dated the 6th day of March, A. D. 1908, which said deed was recorded on the 23d day of June, A. D. 1908.

XVI.

Claimant further alleges that if any injury was received by said libellant at the time mentioned in the libel, it was an injury received from one of the ordinary risks of the business in which he was engaged and not from or by any reason of any carelessness or negligence of this claimant.

XVII.

Claimant further allges that it was not guilty of carelessness or negligence, as in the libel alleged, or otherwise, or not at all, and says that the injury therein described, if any there was, was caused by the fault and the negligence of the libellant and of persons of a like degree of service engaged in the same common employment with the libellant.

Wherefore, claimant prays that the libel herein be dismissed with costs and that in no event shall any decree be entered herein in excess of the S. S. "F. A. Kilburn," a steamschooner, and her freight pending for the voyage.

Claimant further prays for general relief.

(Signed) SAMUEL ROSENHEIM,
Proctor for Respondent and Claimant.

State of California,
City and County of San Francisco,—ss.

Irvin S. Goldman, being duly sworn, deposes and says:

That he is an officer, to wit, Secretary of the Maritime Investment Company, a corporation, claimant of the steamer "F. A. Kilburn," respondent in the above-entitled matter; that he has read the fore-

going answer to the libel of libellant herein and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believe it to be true.

That affiant makes this verification for and behalf of the claimant herein, Maritime Investment Company, a corporation.

[Seal] (Signed) IRVIN S. GOLDMAN.

Subscribed and sworn to before me this 29th day of September, 1909.

SAMUEL ROSENHEIM,

Notary Public in and for the City and County of San Francisco, State of California.

Due service of the within answer is hereby admitted this 29th day of September, A. D. 1909.

FRANKLIN P. BULL,

(Signed) HENRY B. LISTER,

Proctors for Libellant.

Filed Sep. 29, 1909. Jas. P. Brown, Clerk. By M. Thomas Scott, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

BASILIOS HANOS,

Libelant,

vs.

The "F. A. KILBURN,"

Respondent.

Thursday, December 22d, 1910.

Appearances:

H. B. LISTER, Esq., and FRANKLIN K. BULL, Esq., for Libelant.

S. ROSENHEIM, Esq., and H. W. HUTTON, Esq., for Respondent.

(This Libel now came on for hearing in its regular order on the calendar, and the following proceedings were had:)

Mr. LISTER.—If your Honor please, this is a libel by a seaman for an accident on board by the explosion of a boiler wherein he lost the use of his hands. We are suing for damages against the vessel in rem for injuries that occurred.

Mr. BULL.—We have a doctor here, if your Honor please, and we should like to call him out of the usual course, so that he may go away.

Mr. ROSENHEIM.—No objection.

[Testimony of Roscoe Lee Logan, for Libelant.]

ROSCOE LEE LOGAN, called for the libelant, sworn.

Mr. BULL.—Q. You are practicing physician in the City and County of San Francisco?

A. I am.

(Testimony of Roscoe Lee Logan.)

Q. How long have you been such?

A. Since 1901.

Q. I will ask you to examine this man's hands—

The COURT.—I have not got time to have that done. You ought to have had the examination made before the witness came.

Mr. BULL.—Q. You examined the libelant yesterday? A. Yes, sir.

Q. And made a through examination of him?

A. Yes, sir.

Q. Relate to the Court what you found.

A. I found that he had a contraction of the exterior tendon muscles, from the scars all burned, causing deformity which you see at present, which is a contraction of the fingers back.

Q. Will he ever be able in your opinion to use those hands again?

A. Not any more than he is using them at present, unless he has resort to some plastic operation.

Q. What operation would be able to relieve him, if at all, and to what extent would it relieve him?

A. Certain of the digits can be relieved. It is my opinion one or two cannot be. It would mean an excision of the scar tissue which is at present there, and placing the hands in splints with some more or less of skin grafting to take the place of the broken down tissue.

Q. How long would it take to perform an operation?

A. The operation itself would probably take an hour to an hour and a half; the after treatment and

(Testimony of Roscoe Lee Logan.)
care would probably last over a period of anywhere from two to three months.

Q. Would it then restore to him the use of his hands and his fingers?

A. That I could not say. It would be almost sure to get some results, but how much, I could not say.

Q. Would he, after such an operation had been performed, be able to use his hands to the same extent as he had before the injury? A. No, sir.

Q. Would he be able to do any manual labor such as a fireman is required to do on a steamship?

A. It is very possible, but I would not say.

Q. Do you say it is possible?

A. It is possible.

Q. You would not care to say positively with regard to the matter? A. I would not.

Q. As the hands exist at the present time, could he perform any such labor?

A. I don't know what those labors consist of that you are speaking of.

Q. Fireman on board of a steamship, for instance, attending to the putting of coal in the boiler when required, cleaning flues and manual labor?

A. Shoveling?

Q. Yes.

A. Hardly; the tendons are too firmly contracted backwards. He could by some mechanical contrivance, but he could not by the hands themselves.

Q. What kind of a operation would have to be performed in your opinion in order to give any re-

(Testimony of Roscoe Lee Logan.)

sults or relief to this man? Explain it on your own hand.

A. It is the burn of a third degree.

Q. That is the most serious burn that could be had?

A. Barring gangrene, yes. The skin itself has been entirely denuded even to the subcutaneous fat, and to a certain degree the muscles and tendon sheets, which control both hands. In healing nature of necessity was depended upon. Granulation tissue forms as it usually does, and in so forming, if the hands are not kept in splints, or skin grafting was resorted to, the tendons themselves are caused to contract by virtue of the scar or cycatrixial tissues. To relieve that condition, the plastic operation would have to be performed, which would cause the denudation and excision of that scar on both hands. The tendons, relieved from their adhesions to the scar tissue, the hands put in splints to hold them to their normal position, holding the tendons in that position, and to faciliate perfect healing a resort to skin grafting would undoubtedly have to take place. That operation, inasmuch as about an eighth of an inch—it would take probably one inch square a month to heal by skin grafting—about an eighth of an inch grows a week, it would take about a month for that one inch to thoroughly heal, it is an exceedingly slow process.

Q. During that time he would constantly have to be under the care and attention of a practicing physician and surgeon?

(Testimony of Roscoe Lee Logan.)

Mr. ROSENHEIM.—Q. Objected to as leading.

A. Yes, sir.

The COURT.—The objection is overruled. The question is really an unnecessary one. I would know that without any testimony at all. The man would have to have some care.

A. The only reason to believe this would not take place, healing perfectly, is on account of the extensive grafting which would have to be done, and the hand would have to be kept in an open splint and mist dressing continually kept up until healing had entirely taken place.

Mr. BULL.—Q. Even after the performance of that operation, is the burn of such a serious nature that in your opinion, it would not cause him to lose the free use of his fingers?

A. Inasmuch as the anterior surface of the hands are in perfect condition, the contractions are not due to any burn of the inside he can flex them in the palm, as far as the scar will allow him, would make me believe some results could be obtained by operation. He can flex them this way (illustrating), it is the posterior aspect of the hands, which were scalded, and contracted by scar, a relief of that scar would undoubtedly cause them to flex the fingers to some material amount, how much I am not able to say.

Q. Do you think that any physician could say that without trial of the actual experiment or the surgical operation?

A. He would say, classifying it in that manner,

(Testimony of Roscoe Lee Logan.)

how much results he could not say.

Q. From the experience you have had in these matters as a physician and surgeon, I will ask you if you consider the injury received to this man's hands a serious injury. A. Undoubtedly, yes.

Cross-examination.

Mr. ROSENHEIM.—Q. Doctor, should the operation you have mentioned not have been performed some time back, that is, shortly after the injuries were received?

A. That is entirely dependable upon the amount of infection and *seperation* which was there following the burn or scald. My work is practically all surgical. There are times when it is almost impossible to put them in splints. At other times you can. Whether this could have been, is beyond my knowledge. Suppuration follows oftentimes very severely, causing constitutional symptoms, that is, toxima.

Q. You did not attend the case originally?

A. No, sir.

Q. You are unable to say at this time whether or not the operation could be performed as successfully now as then?

A. I could not say conscientiously.

[Testimony of Basilios Hanos, for Libelant.]

BASILIOS HANOS, the libelant, sworn.

(RICHARD DE FONTANA, sworn as interpreter.)

Mr. ROSENHEIM.—I should like to ask a few questions of the interpreter first, if your Honor

(Testimony of Basilios Hanos.)

please, along the lines as to what interest he has taken in the case.

The COURT.—Proceed.

Mr. ROSENHEIM.—Q. What is your name?

The INTERPRETER.—Richard de Fontana.

Mr. ROSENHEIM.—Q. What is your occupation?

The INTERPRETER.—Consul of Greece.

Mr. ROSENHEIM.—How long have you known this libelant, Mr. Basilios Hanos?

The INTERPRETER.—Right after his injury.

Mr. ROSENHEIM.—Did you procure a lawyer for him in this matter?

The INTERPRETER.—I don't know. I only introduced him to counsel.

Mr. ROSENHEIM.—Who did you introduce him to?

The INTERPRETER.—Mr. Bull.

Mr. ROSENHEIM.—The attorney who is here in court?

The INTERPRETER.—Yes.

Mr. ROSENHEIM.—You have been rather representing him, have you not, outside of counsel?

The INTERPRETER.—No, sir, I have not.

Mr. BULL.—If there is any objection to Mr. de Fontana, we do not want to have him.

The COURT.—I do not understand there is any objection. The only question is whether he will correctly interpret the testimony. That is all.

Mr. LISTER.—Q. What is your name?

A. Basilios Hanos.

(Testimony of Basilios Hanos.)

Q. What is your business? A. Fireman.

Q. On or about the 19th day of January, 1908, where were you employed?

A. On a steamship.

Q. What steamship? A. The "Kilburn."

Q. Was it the steamship "F. A. Kilburn" the steam schooner? A. Steam schooner.

Q. Was it the "F. A. Kilburn"?

A. Yes, sir.

Q. On the 19th day of January, 1908, state, if you know, if anything especial happened on the boat? A. The tube of the boiler broke off.

Q. What tube of the boiler?

A. I do not know exactly which tube.

Q. What kind of a boiler was this?

A. A water tube.

Q. Was this one of the main boilers that propelled the steamer "Kilburn"?

A. Both boilers were the same.

Q. How many boilers were on that vessel?

A. Two. One in front and one in the rear.

Q. Did they furnish all the steam for the propulsion of this vessel? A. Yes, sir.

Q. Whereabouts was this tube that broke?

A. Inside of the boiler.

Q. Was this one of the main tubes in the boiler?

A. I could not tell personally.

Q. Where were you when this tube broke?

A. In the fire-room.

Q. How long had you been on watch?

A. I took charge of the watch at 8 o'clock, and

(Testimony of Basilios Hanos.)

at 5 minutes to ten the tube broke.

Q. Before this tube broke was there any leaking of steam around the tube?

A. There was no leaking of steam.

Q. How did the tube break?

A. Just broke in two in the middle.

Q. How do you know it broke in two in the middle?

A. They brought it down to the inspector.

Q. Where were you when this tube broke?

A. In the fire-room.

Q. How near to this boiler were you?

A. From here to there (pointing).

Q. What did you hear?

A. I only heard the noise.

Q. What kind of a noise was it?

A. It made a noise and then the water run into my face and I run away.

Q. Did you see anything?

A. I was blinded by steam.

Q. Then all you know is that you heard a noise and were blinded instantly by steam; is that all?

A. Water and steam.

Q. How long had the vessel been out of port when this explosion occurred?

A. About four or five days; I don't remember very well.

Q. How long had it left port? How far was it from port?

A. It was about 150 miles outside of Monterey, I don't know exactly.

(Testimony of Basilios Hanos.)

Q. What else happened to you when this explosion occurred? A. I only was burned.

Q. Was it steam or water that was thrown over you? A. Both together.

Q. Was the fire door open at the time of this explosion? A. The pressure was too strong.

Q. That is not an answer to my question. I asked whether the fire door was open?

A. It was closed.

Q. Was this water tube boiler enclosed in a casing? A. It had asbestos on the outside.

Q. An asbestos casing?

A. I don't know how they call it.

Mr. LISTER.—Mr. Rosenheim, will consent that this is a cut of about the class of boiler, which is one of the catologues of the company, on page 18. I will ask to have it introduced in evidence.

Mr. ROSENHEIM.—We have a diagram of the original here.

Mr. LISTER.—I would rather have that.

Q. I will ask you to examine—

The COURT.—He probably does not know anything about that.

Mr. LISTER.—Q. How badly were you scaled at this time? A. All over this body.

Q. Before this occurred were your hands in good condition?

A. They were in perfect condition.

Q. State what was done to your hands after this occurred?

A. After the burning they put some kind of a

(Testimony of Basilios Hanos.)

plaster in oil on me, and took me to the hospital at Monterey.

Q. How long were you at Monterey Hospital?

A. 40 days.

Q. How long had you been on this vessel?

A. About three months. But I am not exactly sure it is three months.

Q. And during that time did you ever see the tubes of this boiler cleaned?

A. They did not have time to clean them, they used to clean five or ten at a time.

Mr. ROSENHEIM.—That is not a response to the question. I move to strike out the answer of the witness.

The COURT.—Let it remain.

Mr. LISTER.—Q. What was the condition of the tubes when they were cleaned?

A. They used to take out pieces of dirt about that big (illustrating) smaller, and different sizes, salt and other kinds.

Q. Was this substance that you say they took out coated all around the tubes on the inside?

A. It was.

Q. Was it a hard substance?

Mr. ROSENHEIM.—Objected to as leading. He might describe what it was.

A. They used to strike it with a hammer before they took it out.

Mr. LISTER.—Q. Do you know what that substance was called by seafaring men or engineers?

A. They called it scale. I don't know it by any

(Testimony of Basilios Hanos.)

other name; they call it scale.

Q. Did you ever see this boiler with the casing off? A. No, sir.

Q. Did you ever see it when they cleaned it?

A. I did see it.

Q. Did you see the position of the tubes in the boiler when you were handling the furnaces?

A. I never looked at that.

Q. Do you know how the tubes ran in it, which way they ran?

A. I don't know which way they ran.

Q. I will show you this picture and ask you if you recognize the shape of the tubes in the fire boxes (pointing)?

A. These are small tubes and these are large ones (pointing).

Q. Were these the tubes that you cleaned?

A. Yes, sir.

Q. Did you clean them from this end or that end? A. From this end, (pointing).

Mr. LISTER.—I will ask that this be introduced in evidence and marked Libelant's Exhibit 1.

Mr. ROSENHEIM.—No objection.

Mr. LISTER.—Q. Who paid your expenses at Monterey?

A. The company who rented the steamship.

Q. What further cost and expense were you put to?

A. I was over $1,000 out of my pocket.

Q. State how you were out over $1,000.

A. I spent that amount for drugs, doctors, hos-

(Testimony of Basilios Hanos.)

pital and personal expenses.

Q. What other hospital did you go to?

A. I first went to the Marine Hospital and then to the French Hospital.

Q. To the French Hospital in San Francisco?

A. Yes, sir.

Q. How long were you in the French Hospital?

A. Four weeks.

Q. And how much did you pay there?

A. $21 a week and $10 extra for the bandages.

Q. Have you paid any other fees to any other doctors?

A. No, sir, I did not pay any more to any doctor, but only drugs that I used to buy myself.

Q. You kept no tract of those particular drugs that you bought?

A. I have the receipts for them.

Q. Were you treated by Dr. Lilly for your hands?

A. Dr. Lilly has been paid by the company.

Q. Dr. Pile?

A. Dr. Pile made only an examination.

Q. Have you been able to do any labor since this accident happened? A. No, sir.

Q. Has the condition of your hands been produced by that accident alone? Was it the accident that caused the condition of your hands as they are now? A. Yes, sir.

Q. Just hold up your hands so that his Honor can see them. Is that all you can open your hands? Can you open them any more, the fingers?

(Testimony of Basilios Hanos.)

A. No, sir.

Q. Just show what you can do with your hands, the best you can. You never can straighten them out? A. No, sir.

Q. Before your hands were injured, how much a month did you earn?

A. I had about $50 a month salary, and about $20 or $25 extras for working over time.

Q. Did that include your board or did you have board as well? A. They used to board me.

Q. And you were able to work steadily at those wages?

A. Yes, sir. I was working steadily.

Q. Are you a married man? A. Yes, sir.

Q. How many children have you?

A. Two little girls and a little boy.

Q. How old are they?

The COURT.—I do not see that that makes any difference in the case.

Mr. LISTER.—I do not think so myself.

Cross-examination.

Mr. ROSENHEIM.—Q. Before you worked on this steamer, what was your occupation, what class of work did you do? A. Fireman.

Q. How long have you been a fireman?

A. I have my papers showing I have been 16 years in the business.

Q. How long did you say you worked on the steamer?

A. The one where the accident occured?

Q. Yes.

(Testimony of Basilios Hanos.)

A. About three months; I am not sure exactly.

Q. Had the vessel not been to Boole's Shipyard just prior to that trip? A. A month.

Q. How long prior?

A. About two days before they started.

Q. Two days before they started on the trip on which you were injured? A. Yes, sir.

Q. And were not the boilers cleaned out at that time?

A. They did not have time to clean the boilers.

Q. Did they not do any cleaning on the boilers? Do you say that?

A. Just as usual, they cleaned part of them.

Q. Did you take a hand in the cleaning of the boilers?

A. I was cleaning in the fireroom at the time.

Q. The boiler tubes?

A. No, sir, not the boiler tubes.

Q. Did you never clean the boiler tubes yourself? A. Not in this steamship.

Q. Were you present when depositions were taken of two witnesses called on your behalf, Mr. Constantine and Mr. Malikis, here in this city, recently? A. They gave testimony.

Q. Were you present when they gave testimony?

A. I was.

Q. Don't you remember that one of those witnesses testified that you did take part in the cleaning of the boiler tubes?

A. I don't remember.

Q. You don't remember whether either of those

(Testimony of Basilios Hanos.)

witnesses so testified in your presence?

A. I don't remember.

Q. I will ask you then—

Mr. BULL.—They testified in English.

Mr. ROSENHEIM.—In any event the testimony is here.

Mr. BULL.—They testified in English, and this man does not understand or speak English.

The COURT.—I think so far as this witness is concerned it is immaterial whether he heard it or not. This witness testified that he did not clean these tubes, that he never did on this steamer, that is what he testified to. That being so, if you have any witness here who can testify that he did, you have a right to put that witness on the stand.

Mr. ROSENHEIM.—How many tubes were cleaned out over there at Boole's shipyard when the ship was on the ways?

A. I don't remember very well, but there might have been 20 or 30. I am not sure. I don't know.

Q. How often did you see the tubes cleaned?

A. In every port we used to reach they were cleaning a few tubes on each boiler.

Q. When was this?

A. On reaching a port.

Q. That would be each time they reached port, is that it?

A. On reaching the port of San Francisco only.

Q. How often did they reach the port of San Francisco? A. Every three or four days.

Q. You did not see the boiler tube that broke

(Testimony of Basilios Hanos.)

right after it broke, did you?

A. I see the tube at the Inspector's office.

Q. How long afterwards?

A. About three or four months afterwards.

Q. That was the first time that you saw it after the accident occurred, was it not?

A. That was the first time I seen it.

Q. When the accident occurred where did you go and what did you do?

A. I went on top of the deck.

Q. When you first heard this noise what did you do?

A. I went to watch the engine and the water and steam struck me in the face.

Q. Is it not a fact that you went into the engine-room and did not go back into the fireroom again?

A. The minute I made a step forward, I was struck by the steam, and then I backed and went up stairs.

Q. Did you call the engineer?

A. I could not call the engineer at all.

Q. You have an injury to your left hand, a finger is off. When did that happen?

A. That happen about 20 years ago.

Q. That is in the same condition. It had nothing to do with this accident? A. No, sir.

[Proceedings Re Depositions.]

Mr. LISTER.—We have some depositions that we would like to have opened. They may be opened?

The COURT.—Yes. It is not necessary to read

them. Just state what they are.

Mr. LISTER.—They are the depositions of the firemen who had cleaned these tubes, and who stated that the tubes of these boilers were so full of scale that they were unable—

The COURT.—Just give the names of the witnesses and introduce the depositions in evidence. It is not necessary to read them. I will read them.

Mr. LISTER.—John Malikis and J. Constantine. It is not necessary to state the substance of them.

The COURT.—No, unless counsel insist on it. Ordinarily those things are introduced. I read them at my leisure. You can refer to them in making your argument.

Mr. ROSENHEIM.—I would like to inquire if either of these witnesses are in the jurisdiction of the Court or the courtroom.

Mr. LISTER.—They are not here. They were both going to leave the port, the one was going to South America, and I do not know where the other was going. I have not seen them since or heard of them. I will ask my client.

[Testimony of Basilios Hanos, for Libelant (Recalled).]

BASILIOS HANOS, recalled.

Mr. LISTER.—Q. Ask him if he has any knowledge of where these two witnesses are.

A. They are away out.

Mr. LISTER.—I did not think they are in the jurisdiction. We were going to have them as wit-

(Testimony of Basilios Hanos.)

nesses in court. When we agreed to a continuance of this case, Mr. Rosenheim agreed that we should take their depositions, and we took them by consent before him, and had them under subpoena.

Recross-examination.

Mr. ROSENHEIM.—Q. One further question. After the accident, after the tube burst, did you leave the fireroom and go into the engine-room and come back, and was injured when you came back?

A. I did not have time to take a step forward before I was injured.

Mr. LISTER.—One more question that I overlooked.

Q. Can these tubes be cleaned while there is water in the boiler?

Mr. HUTTON.—It is not shown that he is an expert on that. I do not think it is material anyway.

The COURT.—If he knows, he can answer the question.

A. They have to be emptied first.

Mr. LISTER.—That is our case.

(Mr. Hutton stated the case for the respondent.)

[Testimony of John T. Flinn, for Respondent.]

JOHN T. FLINN, called for the respondent, sworn.

Mr. ROSENHEIM.—Q. Where do you reside, Mr. Flinn?

A. 357 San Carlos Avenue, San Francisco.

Q. What is your occupation?

A. Marine engineer.

(Testimony of John T. Flinn.)

Q. How long have you been such?

A. For the last 15 years.

Q. Duly licensed? A. Yes, sir.

Q. On what steamer are you engineer?

A. On the "F. A. Kilburn" at present.

Q. How old is she?

A. Sixteen years the 16th day of next April.

Q. How long have you been engineer on the "Kilburn"?

A. For the last five years chief engineer. I was first assistant of her the previous nine months. I have been with her since she has been built.

Q. Please tell the Court what kind of boilers are on the "Kilburn."

A. Pipe boilers, Babcock and Wilcox.

Q. Is it the same boiler that is there (pointing)?

A. Yes, sir.

Q. As when she was built? A. Yes, sir.

Q. Do you know whether the Babcock & Wilcox boiler is a high class boiler? A. Yes, sir, it is.

Q. Is it in general use upon modern steamers?

A. Yes, sir.

Q. Now, could you tell the court more about this boiler?

A. It is the same as any other pipe boiler.

Q. About the history of it. How about the tubes? Have you had any trouble excepting this instance?

A. That is the only trouble I had with that particular boiler that this accident happened since I have been in the ship, before or after.

(Testimony of John T. Flinn.)

Q. How often were the tubes cleaned out?

A. As a rule, we generally try to clean them every 12 days.

Mr. BULL.—We object to the rule.

The COURT.—Let the question be answered.

A. As a rule, we generally clean those boilers every 12 days, but there were times that I left them run three weeks, when I would not get at them; that is, when the other vessel was late, never more than three weeks.

Mr. ROSENHEIM.—Q. I refer to times preceding the accident that is in controversy here.

A. Previous to running on the southern run we cleaned them every 12 days. After we went south we cleaned them every 12 days except when the other vessel was late, we would have to take her place and then we would do them every three weeks; that was in the winter time.

Q. Something had been done to the vessel just prior to this trip when Mr. Hanos was injured?

A. Yes, sir; we were over at Boole's shipyard.

Q. Where is that? A. Oakland.

Q. What was being done there?

A. We were putting in a new tailshaft, and while the ship was over there we cleaned the after boiler.

Q. How many boilers are there? A. Two.

Q. Did you clean that boiler thoroughly?

A. Yes, sir, every tube in it.

Q. You heard some talk here about scale; what was the condition of that?

A. There was no more scale in that boiler than

(Testimony of John T. Flinn.)

in any other. There is more or less scale in all boilers. That is a thing we never trouble about outside of what was on the tube originally.

Q. Were they practically clean as well as boilers can be clean to your knowledge?

A. Yes, sir.

Q. What means were adopted to clean them?

A. We had a tube scraper, a hand scraper, and a fresh-water hose. The stuff we removed there was nothing more than red mud. There is a light coat or scale on tubes that prevent putting; we never care about removing that. That is for the protection of the tube. There was a formation of red mud. We used to get that about a thirty-second or a sixteenth of an inch thick. We used to take that out with a hand scraper.

Q. Did you inspect the tubes before they were cleaned?

A. Yes, sir, before cleaning and before closing up.

Q. Please explain fully how you inspected them?

A. We run the water out of the boilers, took the plates off fore and aft, and examined every tube with a light in one end, and looked through from the other. After the boiler is ready to be closed, we go in the furnace with a candle and examine them; that is about three or four or five rows up. After that it is an impossibility.

Q. Did you do that on this occasion?

A. Yes, sir.

Q. I will hand you some certificates and ask you

(Testimony of John T. Flinn.)

when inspections were made by the Government inspectors?

A. All the inspections but one was in San Francisco. That one was in Portland. That was in the year that this accident happened.

Q. When was that made, how long before the accident happened?

A. We were generally inspected in May, the 9th or 10th; we were inspected on the 6th of May in Portland—the 9th of May, that is it.

Q. By the Government inspector in each case?

A. Yes, sir.

Mr. ROSENHEIM.—These are offered in evidence.

Q. What was the amount of pressure that was on at the time that the tube let go?

A. We carry 200 or 224 pounds.

Q. What was the amount allowed?

A. Two hundred and twenty-five.

Q. What do you say was the amount on at the time? A. From 223 to 224, between that.

Q. Did you see the tube that let go afterwards?

A. Yes, sir. I went in there immediately after I shut off the steam on that boiler.

Q. You looked at it? A. Yes, sir.

Q. What appeared to be the difficulty?

A. It is pretty hard to say what it was. The tube looked as natural as the day I went in except where it let go.

Q. Is it your judgment that it let go because of the latent defects of the tube?

(Testimony of John T. Flinn.)

A. It may have been that. I am not experienced enough to say that.

Q. Is that to the best of your knowledge?

A. Yes, sir.

Q. What was done with the tube that let go?

A. I cut it off, cut it in four sections and turned it over to the United States inspectors when I arrived in San Francisco.

Q. I will show you these portions of tube from the inspectors' office (pointing).

A. That is the tube next to the one that let go.

Q. Perhaps the inspector himself will know more about that. Was the other in the same condition as this?

A. There was a smaller piece.

Q. What is this tube (pointing)?

A. That is a piece of it.

Q. A piece of the one that go?

A. Yes, sir.

Mr. ROSENHEIM.—I call the Court's attention to this tube.

Q. I will ask you about the tubes generally; were they all in the same condition as this?

A. Yes, sir.

Q. No more showing of scale on any than there is on this? A. No, sir.

Q. This does not show any scale at all?

A. That is all the scale we ever had, a scale we never care about removing, because that prevents pitting. There was nothing but red mud on and I could put the hose on and take it off with my finger,

(Testimony of John T. Flinn.)

outside of the scale that was underneath the red mud.

Q. In what position in the box were these tubes?

A. That is the third row, counting the two-inch tubes from the bottom. There is a row of four-inch tubes below that too. It will be about the fourth or fifth row on the port side of the boilers, the outside of the boilers.

Mr. ROSENHEIM.—There is no objection to those certificates of inspection?

Mr. BULL.—None at all.

Mr. ROSENHEIM.—Q. Point it out to the Court on this diagram (Libelant's Exhibit I)?

A. It is the third row here.

Q. The third row from the bottom?

A. Yes, sir.

Q. You see this is your four-inch tube.

A. It is the third row. This is the first, second and third. Eighteen inches from the back header.

Q. Could that tube have been seen by looking underneath or from the others or any other way?

A. The only way you could see the tube is, they are so close together that it is impossible to examine them all on the outside, as near as you can get to it, you can put a candle in about three or four to five rows up from the bottom. You can examine the rest of the tubes from the top, as near as you can get to them, but not a thorough examination— as good an examination as can be made.

Q. What is this?

A. That is a piece of the tube that let go.

Q. Was that the general condition of the tube?

(Testimony of John T. Flinn.)

A. Yes, sir.

Mr. LISTER.—Q. Where is the piece that was broken? A. In the inspector's office.

Mr. LISTER.—Why was that not brought?

Mr. ROSENHEIM.—It was left there, and seems to be mislaid somehow. I have been endeavoring some time to get that piece. It was there, however, when the inspector made their investigation and reported. These tubes are all offered in evidence, and the other also, if it appears during the time, or at any time before the matter is decided. I will ask that this small piece be marked "Respondent's Exhibit 4," and the others 5 and 6. The others are in evidence without objection.

Q. Mr. Flinn, I want to ask you have you given the matter of boiler tubes some study?

A. Yes, sir.

Q. And considered the history of them, etc., on various vessels? A. Yes, sir.

Q. According to your experience?

A. Yes, sir.

Q. I will ask you whether or not it is a fact that sometimes upon even the trial trip of a vessel, a boiler-tube will go?

A. Yes, sir. The present vessel I am on, the life of those tubes, has the record on the Pacific Coast. There have only been two tubes removed in that boiler in the five years that she has been running; that is the two-inch tube that let go. I have done nothing to those boilers outside of cleaning them and getting ready for inspection.

(Testimony of John T. Flinn.)

Q. Has she got the same tubes in now?

A. Yes, sir. Nothing has been done before or after the accident to this tube.

Q. Is the condition of the tubes like the condition of that one exhibit there? A. Yes, sir.

Q. Have you heard of Government vessels, men-of-war, having accidents to the boiler-tubes found out on their trial trips?

A. I have read it in the papers.

Q. What vessel?

A. There was a vessel in Magdalena Bay; I think the "Bennington."

Q. The same kind of boiler?

A. Yes, sir.

Q. I want to ask you about the character of steel in this tube, whether it was an A1 character of steel?

A. Yes, sir, it is; it is the best that is made.

Q. Did you, according to the best of your knowledge and ability, use every means that you knew of to avoid accidents?

A. Yes, sir. There was only one thing to do in a thing of that kind, to keep them clean; that is the only secret to pipe boilers, to keep them clean.

Q. What did you do in that behalf?

A. I always did so.

Q. Always kept the boilers clean?

A. Yes, sir.

Q. There is something in these depositions about hammering having been done?

A. There was no hammering done on the boilers. The pipe boiler is so constructed; it will not

(Testimony of John T. Flinn.)

stand for hammering.

Q. Why not?

A. Because the tubes are placed in the header and rolled.

Q. Was any pipe driven through or any bar?

A. No, sir, nothing. There is a hand scraper, a two-inch, with a three-quarter gas pipe attached.

Q. Any testimony to that effect is not true?

A. Not that I know of.

Q. You never saw anything of that kind done?

A. I never saw anything of that kind done?

Q. How about being there when work was done?

A. I was not there at all times, but most part of the day. I was there before the boiler was shut up, and always there when it was opened.

Q. Do you know this man Malikis and Constantine? A. Yes, sir.

Q. Did you know them by those names?

A. Yes, sir.

Q. Where were their places in the vessel?

A. Constantine was an oiler; Malikis was a fireman.

Q. Which one of them, if either of them, had anything to do with cleaning out boiler tubes?

A. Constantine had nothing to do with them; he was in the engine-room.

Q. To the best of your knowledge he never cleaned any boiler? A. No, sir.

Q. It was not his work and he never did anything of that kind, as far as you know?

A. No, sir.

(Testimony of John T. Flinn.)

Q. There is something in those depositions about there being, in some parts, the scale was a sixteenth of an inch, and in other parts there is something which might be construed to mean that it was very thick, and so thick that even a bar could not be driven through; what is the fact with regard to that?

A. No such condition. The scale that was in those tubes was about as thick as my finger nail. Scale is not advisible to be removed. It is a protection to the iron. It prevents pitting. All I have seen on those tubes since I have been running is red mud. When we come into port we cut the boiler open and we let that boiler law until the morning. Then we run the water into the bilges and after running that water in, the sediment settles in the lower rows of tubes, the boiler being warm, the sediment gets a little hard, and you have to soften that red mud up; while cleaning it with a scraper we use a fresh-water hose.

Q. I will ask you if it is possible in a case of boiler tubes or any steel construction or rolled plate or wrought iron for a flaw to exist which is not visible before inspection? A. Yes, sir.

Q. Please explain that a little more fully.

A. You can have a tail-shaft made for a vessel, and pass inspection by Lloyds inspector, and when you get outside of the heads you find a break or flaw in the iron. It is possible to detect it. It is the same case with a tube. A tube can be manufactured in the same way.

Q. So that with the most careful inspection it

(Testimony of John T. Flinn.)

would not be visible looking at it from the outside?

A. Unforeseen.

Q. Some such thing as slag or some foreign substance?

A. It is pretty hard to say what was the cause in a case of that kind. It is the same as a shaft. It can be turned up in the lathe and look as good as it ought to be, and when you get outside you find a flaw in it. It is a defect in the iron.

Q. With reference to this particular tube, there was nothing from an outside inspection which disclosed any defect in the composition?

A. No, sir.

Q. Is there anything about this accident, relative to the accident which you know of, and which I have not asked you about, before you leave the stand, that you would like to state to his Honor?

A. How it happened?

Q. Yes.

A. The first I knew of the tube letting go was when I came on deck. I was eating my breakfast and an oiler said I was wanted below. I started below and found the fireroom full of steam. I stepped in and shut off the auxiliaries, main stops on the live boiler, all auxiliary valves, and immediately went below. The oil was still running the after-boiler. I shut the burners out and turned my attention to the live boiler that was in condition. I put the injector on and found I had an inch of water, and started and got under way. I made a thorough inspection of the tubes and found it was a two-inch

(Testimony of John T. Flinn.)

tube that let go. We cut it out and put a new one in.

Q. Could the libelant himself not have stopped the steam?

A. He could have shut the oil-burners off. I could not say so because I was not there at the time of the accident, and I don't know the conditions. I went down there afterwards, in the fireroom.

Q. What did you do?

A. I shut off all the stops and auxiliary valves; the fireroom was full of steam. I went to the top of the boiler and shut off the auxiliaries to the valves and steam of the oil pumps, and turned my attention to the main stops. Immediately I did that the steam stopped.

Cross-examination.

Mr. LISTER.—Q. Do you mean to tell me that tubing was all in the same condition as this small one?

A. I do. It was in the same condition as that.

Q. The portion that was broken, was that not worn as thin as a piece of tin? A. No, sir.

Q. Did you not so testify before the United States inspectors? A. No, sir.

Q. What has become of that piece of tube?

A. It was left in the Inspector's office.

Q. You cut it out? A. Yes, sir.

Q. Somewhere from the center of the tubing?

A. 18 inches from the back-header.

Q. Was it not thinner than that?

A. No, sir; only where it blew off.

Q. Where it blew off?

(Testimony of John T. Flinn.)

A. After it blew off, where it was ripped.

Q. How much of it was thin?

A. About a quarter of an inch, I guess.

Q. No more than that?

A. That is all.

Q. You state that this boat which is now six years old has the record for keeping a water tube boiler?

A. Yes, sir.

Q. According to that, the life of a water tube boiler is very short; is that so? A. No, sir.

Q. Why six years the record?

A. I am speaking of the tubes in this present boiler.

Q. Why should six years be the record?

A. I have had no trouble with them, and have not renewed tubes. I am not speaking of the boiler in general, but of the tubes.

Q. Is six years an exceptional length of time for the life of a tube?

A. No, sir. it is not; it is longer.

Q. How do you mean that you have the record for keeping a water-tube boiler when you have only had six years of life to those tubes?

A. There are other pipe boilers that have renewed four-inch tubes and two-inch tubes. I have renewed none. That is how I have the record.

Q. You have to record for not renewing tubes?

A. Yes, sir.

Q. You state that all the tubes to-day are as good as this (pointing)? A. Yes, sir.

Q. How do you know?

(Testimony of John T. Flinn.)

A. Because I have gone through them every three weeks.

Q. You know this is a very bad tube (pointing)?

A. I don't know that it was bad.

Q. How do you know the other tubes are as good to-day?

A. Through my examinations of them with a candle.

Q. You only examined that with a candle?

A. I hold a light through to see.

Q. Is there any means of finding out and properly examining these tubes when their life is coming to an end?

A. They are inspected and a hydrostatic pressure put on them.

Q. You rely on that solely?

A. No, sir, not solely.

Q. What other means do you adopt?

A. Examine the boiler every time we clean it.

Q. With what? A candle? A. Yes, sir.

Q. Is that all? A. That is all we can.

Q. You never examined this boiler except with a candle to find out the thickness of those tubes?

A. You can examine them from the back end and the front end, and the ends of the tubes where they are projecting out.

Q. You have never examined them to see if they are worn thin?

A. Yes, sir, I have, to the best of my knowledge.

Q. I will ask you whether these boilers are not constructed in sections, of which this is a cut (point-

(Testimony of John T. Flinn.)

ing)? A. Yes, sir.

Q. So that those sections may be each taken apart? A. Yes, sir.

Q. You may try those tubes with a hammer test, if you wish? A. Yes, sir.

Q. Were they ever tested by the hammer test to find out if they were growing thin at any place?

A. No, sir.

Q. Never? A. Not the two-inch tubes.

Q. Notwithstanding the fact they were reaching their limit of the life of the tube?

A. I don't know the life of a tube.

Q. You knew you had the record?

A. Yes, sir.

Q. Do you consider there was skill in sitting down and keeping that running, or extreme carelessness?

A. No, carelessness, because you did not sit down.

Q. Neglecting to examine them for the hammer test?

A. I always did everything to the best of my ability.

Q. All other engineers, long before a tube reaches this age, had examined them sufficient to renew a great number?

A. No, they will not. They generally let go or blister.

Q. They wait until they let go?

A. I have taken four or five tubes out of the forward boiler and found out they were in as good condition as the day they were put in, with the exception of a blister. The wear and tear is not great enough

(Testimony of John T. Flinn.)

to thin the iron tube.

Q. You have never taken these sections apart?

A. No, sir. You will have to tear the ship apart to do that.

Q. These boilers are so made that you can take them out in individual sections? A. Yes, sir.

Q. There is what we call the header. Those may be disconnected and entirely take out, each section take up on the deck, tested with a hammer, and examined?

A. Yes, sir, but I never seen it done in my experience.

Q. They are constructed in that manner?

A. I have never heard or seen it done in all my experience.

Q. It is constructed in that manner?

A. I don't know.

Q. What would you do if the header gave way?

A. We would have to repair it.

Q. You would have to take a section out?

A. Yes, sir.

Q. During all these six years no test has been made to see if these tubes were in proper condition?

A. Yes, sir; they were examined.

Q. Only by looking through them?

A. And looking on the outside, and showing a candle up at the furnace.

Q. You have stated that you cannot examine them from the outside and tell whether they are wearing thin. I will ask you whether under the intense heat you use an oil flame. A. Yes, sir.

(Testimony of John T. Flinn.)

Q. What causes a water boiler to wear out ultimately?

A. The pipe boiler is six years old next April, and I have not seen any wear or tear on them yet.

Q. You have not seen any wear or tear?

A. No, sir, not on the tubes.

Q. You simply sit down for six years—

A. I have not sit down.

Q. You let it go for six years without examining it?

A. I did not let it go for six years. They were examined from 12 days to every three weeks, as near as we can get at them, in the time allowed.

Q. You have a very short time?

A. We have three to four days every three weeks.

Q. How many tubes do you have in the boiler?

A. 352.

Q. How many tubes do you clean on each trip?

A. We clean a boiler every trip.

Q. Did you get through that whole 350 tubes?

A. Yes, sir.

Q. Were you there yourself?

A. Yes, sir.

Q. How long does it take to clean a tube?

A. The way we were cleaning it would take us from 10 to 15 minutes.

Q. For each tube? A. Yes, sir.

Q. How many days did you have?

A. Four days over there.

Q. That is four tubes an hour?

A. Some of them takes less than that; they vary.

(Testimony of John T. Flinn.)

A four-inch tube we can clean in half an hour. There are 16 of them.

Q. Half an hour to each tube?

A. No: half an hour for all of them: the higher up you go the less time you take.

Q. Did you have four days in port?

A. Yes, sir.

Q. Every time in San Francisco?

A. Yes, sir.

Q. That you can devote to have the boilers empty. How much of that time can you have the boilers empty?

A. We get in at 10 o'clock and the boiler is opened up the next morning.

Q. What time has it to be finished?

A. The night before sailing.

Q. Don't you use it in going around the port?

A. We have two boilers.

Q. That would leave you how much on each boiler? A. Four days.

Q. You say you don't blow them until the next morning?

A. We let them die out. I never blow a pipe boiler, and run the water into the bilges.

Q. Suppose you get in on Monday morning, when would you get to work on that boiler?

A. Tuesday morning.

Q. What day would you leave?

A. Thursday or Friday. Some trips that we get in, we would have two or three days in: other trips we would get in and out the same day. We are mak-

(Testimony of John T. Flinn.)

ing two trips a week.

Q. What kind of a tube scraper did you have for the two-inch tubes?

A. An ordinary hand scraper.

Q. I should like you to explain that.

A. You have seen it. It is a round scraper, split in half, with a round circle, with a lock and spring on it.

Q. Did you ever attempt to clean the tubes with a sponge and scraper which you use in a scotch boiler?

A. Yes, I did. It was three years ago.

Q. You had nothing, having such a scraper as that? A. Yes, sir.

Q. Did you have one of the regular cutter scrapers?

A. They were not in vogue at that time to my knowledge; I never seen one.

Q. Not a year ago?

A. Not to my knowledge; I never used any.

Q. Don't you know they have been in use ever since the water boiler has been used?

A. No, sir.

Q. Have you got one now? A. Yes, sir.

Q. With three cutters on it? A. Yes, sir.

Q. You would not say that an ordinary cleaner for removing the soot—this is the one that is used for removing soot from a Scotch boiler?

A. No, sir; it is a design of my own.

Q. And they use it? A. Yes, sir.

Q. Is it not a fact that they use a piece of pipe

(Testimony of John T. Flinn.)

only to drive through these tubes?

A. That is all, no.

Q. Just a piece of pipe? A. Yes, sir.

Q. Do you know if they tried to force that pipe through with a sledge hammer?

A. No, sir. I never seen a hammer or anything used of that description on a boiler to my knowledge.

Q. But now you have a proper scraper for use on those tubes? A. Yes, sir.

Q. You did not then? A. No, sir.

Q. Except the device of your own which was the best you were able to get?

Mr. ROSENHEIM.—He did not say it was the best he was able to get.

Mr. LISTER.—I am asking that question.

Q. Was it the place of the second assistant to supervise the cleaning of the tubes?

A. The second or first.

Q. Was it not customary for an oiler to work with the second assistant in cleaning tubes?

A. Yes, sir.

Q. Did you state before that Constantine as an oiler had no place in cleaning those tubes?

A. I say he was not detailed for that work aboard.

Q. Do you know he did not do it with the second assistant?

A. Yes, sir.

Q. That he and the second assistant did not clean the tubes.

(Testimony of John T. Flinn.)

A. He did not. He was detailed in the engine-room.

Q. On that boat? A. Yes, sir.

Q. Where were you at the time of the accident?

A. I was down below and on deck, wherever I was called for to go.

Q. You say this tube was actually thinner in the part that burst?

A. I know the tube let go there, the cause I don't know. I could not say if it was burned or a defect in the iron. I am not chemist enough to explain.

Q. It was thinner? A. Yes, sir.

Q. This is not a fair specimen?

A. It is a piece of tube.

Q. Not of the part of the piece that broke?

A. About 14 or 15 inches.

Q. It is very different to the piece that broke?

A. Yes, sir; that is a piece on the end.

Q. The appearance is different?

A. No, sir; there is no difference where the tube let go.

Q. But the inside?

A. The inside is exactly the same.

Q. I will read to you from a work on engineering, and ask you if this is correct, on Boiler Explosions: "Marine boilers explode chiefly from corrosion, decay of stays and accumulation of salt, scale, or incrustation. Locomotive boilers explode chiefly grooving or furrowing, or from cracks caused by the movement of the shell, either from the motion of the boiler, or from the strains of vary-

(Testimony of John T. Flinn.)

ing pressure. Portable engine boilers explode chiefly from overpressure in the hands of inexperienced attendants, and from corrosion. Water-tube boilers explode chiefly from overheating, caused by a deposit of sediment in the water-tubes."

Mr. HUTTON.—We object to that as incompetent, irrelevant and immaterial. Mr. Lister appears to be reading from a book.

The COURT.—He is asking if that is the cause of it.

Mr. LISTER.—I am asking if that is a maxim or general rule.

A. Yes, sir.

Q. The deposit of sediment or scale in the tubes is the principal cause of explosion in water-tubes?

A. Yes, sir. There are other causes from defects in the iron.

Mr. ROSENHEIM.—What book are you reading from?

Mr. LISTER.—From a book written by myself. I was only asking as a general principle.

Q. You spoke of a latent defect in steel and iron?

A. Yes, sir.

Q. Such a defect does not take generally three or four years to develop?

A. That all depends on how deep it is, the thickness of it. It may only be a pin hole or blow hole on the outside skin, and by working underneath the skin it would not be detected.

Q. If it would be a pin hole it would show?

A. Yes, sir. Not all the way through. It might

(Testimony of John T. Flinn.)

start from the outside or inside of the skin and it would not be visible.

Q. What is the temperature of those oil flames?

A. It runs up to 1800 or 1900.

Q. 1800 or 1900 degrees? A. Yes, sir.

Q. If there was any obstruction of the tubes, and it was subjected to a temperature of 1800 or 1900 degrees, which would be the same temperature as an ordinary incandescent lamp, would it not—never mind that. If a piece of iron was coated with scale or if the water did not circulate properly and was subject to that degree of heat, what would be the result?

A. She would blister on the outside of the tubes. There would not be proper circulation, if that is what you are getting at.

Q. At what temperature does iron become soft and malleable? A. I could not tell you.

Q. At 1800 degrees there is an incandescent brilliant light? A. I don't know.

Q. How did you assume 1800 degrees?

A. Taking the temperature that I have taken in a smokestack and ash-pans, I should judge it may go higher than that; I am only guessing.

Q. The iron would become a cherry red in the furnace if there was not water on it?

A. Yes, sir.

Q. Supposing that scale was in a boiler habitually or in one particular tube habitually, would not the action of the fire upon that gradually burn the outside of that tube?

(Testimony of John T. Flinn.)

A. No, sir, not in a pipe boiler.

Q. If the scale was sufficiently thick?

A. I have never seen a pipe built tube burn out. I have seen them blister.

Q. Blister is where the iron becomes soft?

A. It would expand.

Q. If there had been any scale in this tube, it would have accounted for the explosion, would it not? A. Not that I know of.

Redirect Examination.

Mr. ROSENHEIM.—Q. In your judgment, Mr. Flinn, would a hammering on that tube have disclosed the defect which was in the tube?

A. No, sir.

Q. On this question of the scraper, please describe again what the scraper is that was used by you.

A. It is a hand scraper made of steel, made out of flat steel, half round, with a spring and nut on it. Before it enters the tube it is opened three or four inches. The scraper cleans all the soft mud out of the tube.

Q. Was it sufficient for the purpose for which it was used? A. Yes, sir.

Q. And cleaned out the tubes all times before the accident? A. Yes, sir.

Q. With reference to heat, would the heat strike a tube like this first or a tube below?

A. There are four-inch tubes and two rows of two inches. It had to strike the four-inch tubes first. The four-inch tubes are close together.

(Testimony of John T. Flinn.)

There are three quarters or an inch between.

Q. So that these tubes were not in direct contact with the flame?

A. Yes, sir, they were to a certain extent, but not an intense flame.

Q. The lower tubes were in direct contact?

A. Four-inch tubes.

Q. Did you use proper water in these?

A. Fresh water all the time; no salt water was used in those boilers at any time.

Q. You heard something said about salt; was there any salt in those tubes?

A. No, sir; never any salt water used in them.

Q. How did this mud come to be there?

A. We find that red sediment in all the waters, both at Eureka, Portland, and San Pedro; it comes from the reservoirs. When it gets dry it gets hard and looks like a scale, but it is not. That is in circulation when the boilers are running, that mud is.

Q. How would you wash it out?

A. We have to use the scraper when we run the water out of the boiler; it is a little warm, it cakes on and you use the scraper. If the scraper works hard we put the fresh water in to soften it up.

Q. How thick was it?

A. From a thirty-second to a sixteenth, I should judge.

Recross-examination.

Mr. LISTER.—Q. You say the sort of scraper scraper you now use.

A. We are using a turbine.

(Testimony of John T. Flinn.)

Q. Three little sharp cutters?

A. Yes, sir.

Q. To cut the scale, and they work like three wheels? A. Yes, sir.

Q. That is because the scale is so hard?

A. No, sir; we are using different water. We are giving what they call alum in the boiler water, and it makes it hard to clean.

Q. Now, you have a turbine cutter?

A. Yes, sir. It is quicker method than the other way. We are not allowed so much time on this run as the other. We could not get through, so I put it up to Mr. Doe to get me one of the turbines, and we cleaned the boilers in a day. It is a quicker process.

Further Redirect Examination.

Mr. ROSENHEIM.—Q. Is it a safer process, in your judgment?

A. It is quicker; no safer.

Further Cross-examination.

Mr. LISTER.—Q. You say the sort of scraper that you made would remove the soft mud?

A. Yes, sir.

Q. Would it remove the scale?

A. There was not enough in it to have it removed.

Q. It would not remove the scale?

A. There was no scale to be removed.

Q. I ask you the question.

A. Yes, sir, it would.

Q. That scraper would not remove the scale?

(Testimony of John T. Flinn.)

A. Yes, sir, it would.

Q. You stated this had a spring on, so that when it struck anything it would become smaller.

A. Yes, sir.

Q. And when you struck a piece of hard scale such as this— A. It would take it off.

Q. That hard scale, would it not contract?

A. No, sir. We had no hard scale in those boilers, but soft scale.

Q. You say that this scraper was made so that it would contract?

A. Yes, sir, the scraper I had answered the purpose on the ship in the condition of those boilers.

Q. You think it answered?

A. I don't think so at all; I know it did.

[Testimony of John K. Bulger, for Respondent.]

JOHN K. BULGER, called for the respondent, sworn.

Mr. ROSENHEIM.—Q. Where do you reside?

A. 2124 Broderick Street, San Francisco.

Q. What is your occupation?

A. United States Inspector of Steam Boilers.

Q. Do you know the steamer "F. A. Kilburn"?

A. Yes, sir.

Q. You have inspected the steamer at various times?

A. I have had an assistant inspect her. I have done so once or twice myself.

Q. I show you these certificates of inspection. Did you make any of those inspections (handing)?

A. No, sir.

(Testimony of John K. Bulger.)

Q. Not personally? A. No, sir.

Q. Who made them?

A. Mr. Winn, Mr. Captain Howard ,Mr. Dolan—do you mean the boilers?

Q. Yes.

A. Mr. Dolan, Mr. Winn and Mr. Waters; three assistant inspectors.

Q. I am showing to you the certificates which were offered in evidence. Under whom are these assistant inspectors?

A. Under Captain Bolles and myself.

Q. Did you subsequent to the accident which has been spoken of here make an investigation of the said accident? A. Yes, sir.

Q. At San Francisco? A. Yes, sir.

Q. On or about April 22d, 1908?

A. I think that is the date.

Q. Who else, with you, made an investigation of that? A. Captain Bolles.

Q. O. F. Bolles? A. Yes, sir.

Q. What was he? What was his official capacity?

A. United States Inspector of Steam Vessels.

Q. Did you have before you at that time the tube which gave way?

A. I had two tubes there that were presented to me, the broken part of the tube cut off.

Q. And the part that gave way?

A. Yes, sir.

Q. And then you examined witnesses at that time? A. Yes, sir.

(Testimony of John K. Bulger.)

Q. And examine the tube? A. Yes, sir.

Q. Together with Mr. Bolles? A. Yes, sir.

Q. And made a report? A. Yes, sir.

Q. Concerning the accident, as the result of your investigation?

A. That is as far as the licensed officers were concerned.

Q. Have you that report with you?

A. Yes, sir.

Q. Please produce it.

Mr. LISTER.—I object to this, as we are not trying the licensed officers for their negligence. (To the witness.) That is all, Mr. Bulger, that you were investigating?

A. I examined the tube; I can tell you about the tube.

Mr. LISTER.—I should like to know about the tube.

Mr. ROSENHEIM.—We are not investigating the officers. We say the officers were correct in their report, but just introducing it in evidence, that is all. We think it is relevant too.

The COURT.—Really, I do not think that the report—is that what you call it?

Mr. ROSENHEIM.—Yes, the decision.

The COURT.—I do not think that that decision is relevant. The Court has to determine for itself what the fact is, and will have to do it through the testimony. This witness can tell what he saw. He can tell about that tube. He can give any opinion that he is competent to give. The particular con-

(Testimony of John K. Bulger.)

clusion that he reached is not material. That is the report, is it not, or decision.

Mr. ROSENHEIM.—So as to have the matter in formally, we offer the proceedings.

The COURT.—You can put it in, but my impression is that it is not relevant at all.

Mr. ROSENHEIM.—I have not looked up the point, I confess. It may go in.

The COURT.—Yes.

Mr. ROSENHEIM.—Q. Have you got the report?

A. I have got the original documents to be filled in our office. You have both got a copy.

Q. So that it may be marked, and we will supply a copy to the clerk.

A. Unless this will be returned to me—

The COURT.—It is not necessary to put it on file at all. In these admiralty cases, the practice of the Court is to admit almost anything in the way of evidence. When the Court comes to decide the case, as a matter of course, it will determine it by what it considers relevant testimony. As I say now, my impression is, and it is a very strong impression too, that this decision of these Board of Inspectors is not relevant at all. I do not think that I shall use it in anyway, but still if counsel desire to put that in the record, they can put it in. The proper evidence upon which the Court will act is the direct testimony of this witness of any fact that he can testify to. He said he saw this tube. If he can express any opinion in regard to it, or give any

(Testimony of John K. Bulger.)

description of it, its condition, that is competent and relevant.

Mr. ROSENHEIM.—Q. You heard the statement of the Court. Without requiring me to ask a number of questions. Please detail what you found as the result of your investigation.

A. The tube that I found I could not tell how far it was gone from the end. I found the tube buckled some, as were these, and a blister as large as my hand where it had turned over. Outside of that, where it was drawn down very thin, the tube was perfect throughout; that is all.

Q. You concluded, did you not, therefrom, that it was caused by a latent defect in the tube?

A. I claimed it was defective tube and impossible to see in the position it was placed in the boilers.

Q. The accident occurred through the latent defect in the tube? A. That was my opinion.

Q. Which was not discoverable before the accident?

A. No, sir, the only way to discover it was to cut it out and draw the tube through one of the boxes the same as they do on a Scotch boiler, draw out one or two and try them, and replace them with new ones.

Q. Was it elsewhere in the same condition as this?

A. I could not identify that tube. To my knowledge it never was in my possession, the tube on the floor, with the exception of the broken piece. The attorneys or owners, or some one, came there

(Testimony of John K. Bulger.)

and asked for it and took it away, I never could find out who took it away. These pieces (pointing) I know I had in my room. The other pieces were gone. I think the owner of the ship took them away.

Q. Not to my knowledge.

A. I could not say positively.

Q. I have been trying to locate it and have been unable to do so.

A. It is nearly 18 months ago, and it is pretty hard to carry all this in mind.

Q. The pieces were put in the basement, or something like that?

A. They were in my office up to 60 or 90 days ago; then they were put in the basement, as there was no call for them. I have a faint recollection that I think it was the owner who came there to get that piece of broken tube; I cannot tell.

Q. I was not there looking for it?

A. No, sir.

Q. Personally. Mr. Hutton was there looking at it?

A. Mr. Hutton looked for it and Mr. Lister looked for it, but could not find it.—Mr. Lister's partner. I went down and hunted in the cellar and tried to find it, but it was gone.

Q. Simply mislaid? A. Yes, sir.

Q. You as the result of your investigation, exonerated the engineer, did you not?

A. I exonerated the engineer, yes.

(Testimony of John K. Bulger.)

Cross-examination.

Mr. LISTER.—Q. You said that you found a blister on that tube?

A. I said from the appearance of the tube after it broke there was no doubt it was thrown down an inch and a quarter before it let go, and opened like a shell.

Q. You do not consider that was a latent defect at the time that tube was put in the boiler?

A. I could not tell you when it was put in. There have been several tubes put in that boiler. I think I ordered six or seven myself. I could not tell which one it was that left go.

Q. What would be the cause of a blister?

A. Many things. It may have been lamination.

Q. Ordinarily a blister would show good tensile strength but it had become over heated?

A. I do not understand you.

Q. Where a blister is in a tube or piece of iron, it would ordinarily show that the tensile strength of the iron or steel was good, but that it becomes soft by heating, so that the pressure of the steam forces it out?

A. It could not soften that very well, if you had water in it.

Q. That would be usually the cause of a blister?

A. Yes, sir.

Q. Either any scale on the inside or by the lack of circulation? A. Yes, sir.

Q. So that a blister would usually be caused by scale or lack of circulation? A. Yes, sir.

(Testimony of John K. Bulger.)

Q. A latent defect in the lamination would never form a blister?

A. It would, if it was on the outside.

Q. If the defect in the lamination was on the outside?

A. Yes, sir, according to how it lay in that material, in the rolling up of it.

Q. This had become thin, this pipe?

A. It was not thin until after the accident. It has been drawn down for some reason. After that, when it spread, there was weakness in that tube that made it spread out like that, and it opened out like that.

Q. Do you think from the appearance of that tube that it could have spread so as to become thinner without being overheated just as you testified or by defective lamination; could that tube have expanded without being overheated or heated to a degree of say 1200 degrees or 1500 degrees, in ordinary terms, thinner?

A. The tube shows for itself that it was overheated.

Q. It shows that it has been overheated?

A. Yes, sir; a little overheated, and drawn down soft. The tube was perfectly straight when it was put in.

Q. Sometime it has been overheated?

A. It must have, to get it.

AFTERNOON SESSION.

JOHN K. BULGER, recalled—Redirect Examination.

Mr. ROSENHEIM.—Q. Do you want to make

(Testimony of John K. Bulger.)

some correction in your testimony given this morning? A. I should like to.

Q. Please state what it is.

A. I testified this morning that I thought that the tube had been turned over to the steamboat owners. I had my assistants look for it during the adjournment and they found the missing piece, so I want that part stricken out. I know they applied for it. I have got the tube here.

Q. We ask to see it.

A. This is it (producing). That is where it flares out (pointing).

Mr. ROSENHEIM.—This is offered in evidence. We ask that it be marked Respondent's Exhibit 7.

The COURT.—Is that the way you found it when you first saw it?

A. It is in it's original condition. That is the way it was brought in.

Mr. ROSENHEIM.—Q. Now, Mr. Bulger, you heard some testimony or statement about taking the tubes out of the box, as I think it is called, for the purpose of making inspections and cleaning them often. Do you know if that is ever followed on these steamers with these tubes?

A. I understand it was for a hammer test, to sound the thickness of the tube. The boxes are not removed for that purpose at any time. The tubes are drawn and tested. One or two tubes cut from the box, the same as is done with a Scotch boiler, or in any other boiler.

Q. Have you got that report, and examination and decision with you?

(Testimony of John K. Bulger.)

A. No, sir, I did not bring it back.

Q. I will ask you this question; is it not a fact that this defect in your judgment was not a hidden and latent defect?

A. That is the decision that I rendered in the case.

Q. And that is your opinion?

A. And that is my opinion.

The COURT.—Q. On what do you base that opinion?

A. I base it on the tube itself. It proves it.

Q. On the tube itself? A. Yes, sir.

Recross-examination.

Mr. LISTER.—Q. You say that this is a latent defect. What is the distinction between a patent and latent defect? A. Between what?

Q. A patent defect and a latent defect. Those are the two ordinary terms?

A. I suppose the one could be observed is the patent, and the one that could not be observed is the latent.

Q. That is correct. This is a tube which is, I think you will confess, not more than a sixteenth of an inch thick as compared to another portion of the tube which is at least three-sixteenths of an inch. Is there no way when a tube has become an eighth of an inch thinner than it should be, of finding out and observing that fact. In other words, is it necessarily a latent defect or is it a latent defect which they neglected to look for?

The COURT.—I suppose what you really want to know of the witness is whether that condition then is

(Testimony of John K. Bulger.)

apparent, whether with the exercise of reasonable care that could have been observed while it was in the boiler.

The WITNESS.—That may have occurred there in two hours, in that shape.

Q. The blister would come from the overheating of the tube?

A. I would not say that. I am not in a position to say. I don't know.

Q. It has the appearance of being caused by being overheated at some time?

A. The tube shows that it has been overheated a little. But if the lamination was drawn, it may have spread out.

Q. The lamination or defect, in the material of the tube never in itself could have caused the overheating, could it?

A. No, but the overheating could have caused the defect in the material. If the lamination had been drawn, it would thin it out.

Q. In your opinion this particular tube at sometime has been overheated by being stopped up or having scale in it?

A. They ought to stand a tensile bursting strength of about 3,000.

Q. You think at some time that tube has been choked up with scale?

A. I do not think so because I took that.

Q. It has every indication of being so?

A. There has been five tubes in that boiler that were drawn in the shape they are there, and I ordered

(Testimony of John K. Bulger.)

them out, and they put in new ones.

Q. In your opinion this tube has at some time been overheated? A. Yes, sir.

Q. It is your duty, in regard to these inspections, to put the government test, the hydrostatic pressure, on these boilers? A. Yes, sir.

Q. You are not supposed to give them a hammer test or spend the time necessary to examine every individual tube?

A. You could not give a hammer test to a boiler like that, a Babcock & Wilcox, could you?

Q. By taking the sections apart and examining the tubes?

A. They would not take the sections apart to do that. Would you not draw them out of the box and try it?

Q. Suppose a boiler is getting towards the ends of its life, how would you tell?

A. They generally have a leak on the ends of the tubes. You can examine them on the inside by putting a light through and draw them when you think they are thin the same as you do in a Scotch boiler. They do not draw all the tubes in a Scotch boiler to find out. They draw one or two out and give them a hammer test.

(A recess was here taken until 2 P. M.)

Mr. LISTER.—Q. I will ask you, if it occurred in two hours this necessarily would have to be observed?

A. The tube is drawn and as you know, if you are familiar with the Babcock & Wilcox boilers, some-

(Testimony of John K. Bulger.)

times those tubes drop; in fact, they buckle up. Where that is observed especially in the bottom tubes, they are taken out. I have got the record here to show that some of those tubes have been taken out on that account, and were ordered out by myself. In other words, that tube is stretched before it reached the point where that defect was that caused that thing to break out.

Q. This tube has stretched, in your opinion, by becoming overheated? A. Overheated, yes.

Q. In your opinion, this has not been caused from a latent defect in the tube itself as it originally went in that boiler, but because it became overheated, which it might have done in two hours?

A. I do not agree with you upon that point. There are tubes here that have drawn down from two or three inches that have never fractured, that have been removed from time to time in these boilers.

Q. That is what I was trying to get at. Supposing that there should be in this tube an obstruction so that there was no circulation of water through it, the result would be for it to sag down and overheated and drop and burst in this manner?

A. Yes, sir.

Q. That would be the usual thing that would occur; in fact, it must necessarily occur if there is an obstruction in this tube.

A. Yes, sir; certainly.

Q. It must occur that such an accident as this would happen. Can you conceive of any other cause

(Testimony of John K. Bulger.)

of this occurrence than an obstruction in the tube?

A. I would think, if there was an obstruction in that one tube, the other tubes would certainly be the same.

Q. I am not talking about that?

A. There would not be a single tube with the same obstruction, the same water; and the same circulation, and everything else.

Q. We will take this tube which you say will stand 3,000 pressure provided it is not overheated?

A. Bursting pressure, yes.

Q. Can you advance any theory whereby it would sag down, swell up, and burst, if there was a free circulation of water through it?

A. I have told you that the tube, in my opinion, is softened from the heat, drawn down, and with the defect there was in that tube, which should have stood the pressure that was on the boiler, the defect in that tube when it blew out, it drew on that point which was the weakest point in the tube.

Q. Can you account for any theory why this tube became overheated?

A. Because I think the tube was defective.

Q. In what way?

A. There might have been a lamination and it never gave out until the drawing of the tube.

Q. Supposing there was a lamination, would not the steam, when the lamination broke, escape through that and relieve the pressure?

A. Certainly it escapes through the lamination.

Q. It would not draw out the pipe because it

(Testimony of John K. Bulger.)

would relieve the pressure?

A. If you were to crack that pipe and put a pressure on, the natural inference is it would spread out in its weakest part.

Q. You state this had been overheated. Can you advance any theory of overheating except the plugging up of this tube in some manner?

A. I would not want to state that. I could not say it was plugged up.

Q. Could you advance any theory except that it was plugged up?

A. No, sir, not in one of the boilers of the ship. There were four that I noticed that had buckled like that; they were renewed. I had them cut out. They had never broken at all.

Further Redirect Examination.

Mr. ROSENHEIM.—Q. That was not in this boiler?

A. I could not say which it was. I could not ship.

Q. The other boiler?

A. I could not say which it was. I could not tell you offhand which one it was. I suppose your chief engineer would know. I have a record of where these tubes were ordered renewed in the boiler for that defect.

Q. Which boiler was it, the forward or the boiler in the part that those other tubes were located?

A. I could not remember now. I could not tell offhand which one it was.

(Testimony of John K. Bulger.)

Q. Is it not a fact, Mr. Bulger, that sometimes on the first trip of a vessel, with new boilers, that boiler tubes blow out? A. Yes, sir.

Q. Do you know of any instance in Government war vessels where such occurrences have happened recently? A. I have read of them.

Q. The same kind of a boiler?

A. The same kind of a boiler.

Q. The hidden defect of that boiler is not visible, as I understand you, from an inspection of the tube as it is in the boiler? A. No, sir.

Q. It is not visible upon inspection?

A. No, sir.

The COURT.—Q. Looking at that tube you have it there, can you form any judgment as to the condition of that tube when the vessel left port?

A. No, sir. I cannot. The vessel was inspected in Portland, and this happened about seven months afterwards.

Q. Can you form any judgment as to what must have been the condition of that tube when the vessel left that port and had travelled about 150 miles, I think.

Mr. ROSENHEIM.—Q. After coming from the drydock?

A. It might have been in drawn condition.

Q. But you are unable to say, as a matter of fact, that you would not be able to state positively, what it's condition was at the time it left?

A. No, sir.

Q. You did not see it at the time?

(Testimony of John K. Bulger.)

A. No, sir.

Further Recross-examination.

Mr. LISTER.—Q. Assuming that this tube before leaving port was full of scale, or that the scale was rammed in solid, and suppose there was a cleaner, which, instead of being a rotary cleaner, was a cleaner used in the tubes of a Scotch boiler, one of these divided tools, rammed the scale up so as to form an obstruction in that boiler and prevent the circulation; would three or four hours' run produce such a condition as that, if there was no circulation in that boiler?

A. If there was scale in the tube, and no circulation, it is only natural that the tube would burn out; that is, if there was dirt on the inside of that tube.

Q. Do you know the three cutter tool that was used in these boilers?

A. Do you mean the patent?

Q. Yes. A. I have seen them, yes.

Q. Do you know how long that patent has been in existence, about?

A. The first I heard of it was about two years ago.

Further Redirect Examination.

Mr. ROSENHEIM.—Q. Could you by looking at a tube like this be able to state whether it was the same thickness all the way through, merely by looking at it?

A. It is supposed to be the same thickness throughout when put in the boiler. The drawing of

(Testimony of John K. Bulger.)

the boiler has thinned it out. There has been heat on it to draw it down, beyond question.

Q. Would you be prepared to say that the tube is the same all the way through, even as it is now—I mean the same thickness?

A. When it was put in there?

Q. No, as it is, or even when it is put in?

A. Yes, sir; this tube is the same thickness throughout. That tube has been drawn down. I do not think that is the tube that burst.

Q. It is presumed to be the same thickness?

A. Yes, sir.

Q. You would not know necessarily by inspection whether it was or not. You would assume it was?

A. Yes, sir.

Q. You would not know by inspection?

A. No, sir.

Further Recross-examination.

Mr. LISTER.—Q. As these boilers reach the end of their life what means are taken to see if the tubes have grown thin?

A. When one of these tubes become thin, they generally leak coming in; that it, where they give out first. We cut the tubes out from time to time and test them with a hammer.

Q. You only inspect these boilers once a year?

A. That is all.

Q. You do not hold yourself responsible for the inspection of the boilers seven months afterwards?

A. No, sir; but the Government holds us responsible for them.

(Testimony of John K. Bulger.)

Q. Seven months afterwards?

A. Yes, a year afterwards.

Q. They hold you responsible that the inspection was good at the time you made it?

A. Yes, sir; a boiler can be destroyed in 24 hours.

Q. Suppose that this boat left port with scale in the tubes, so scaly that it burned; that would be no fault of yours?

A. It would be a defective boiler. That is what we are there for. I have reported that the boiler was perfectly clean when we inspected it.

Q. That is seven months before?

A. No, sir; it was inspected twice in this port with the same tubes in.

Q. How long before this accident occurred was she inspected?

A. Seven months to the best of my memory.

Further Redirect Examination.

Mr. ROSENHEIM.—Q. You say you have inspected the tubes since?

A. The boiler has been inspected twice since.

Q. How were they found?

A. They were clean. I have got here where there were four tubes ordered in one; the report says; "These boilers are clean and show good care; the main plant in general well kept up. E. B. Walton. Assistant Inspector." That is May 19th, 1908. Then "May 11th, 1909. 6 four-inch tubes to be renewed."

Q. This was a two-inch tube?

(Testimony of John K. Bulger.)

A. Yes, sir. But there were six four-inch tubes to be renewed at the inspection.

Q. The tube which caused the accident was a two-inch tube? A. Yes, sir.

Q. And in May, 1908, upon the inspection the tubes were found to be in the condition stated in the book, and in the subsequent inspection they were found to be in the condition also stated there in the book.

A. In 1908 and 1909, May, and 1907, this boat was inspected in Portland; January, 1908, on the 19th, the tube broke; since that time the tube has been found clean and the boilers.

Q. What do you mean by "clean"? You mean an absence of scale?

A. There might be a little fill. As near clean as they possibly can be.

Q. We come to this question, if just prior to the accident these tubes were absolutely choked up with scale, so much so that it was possible in many instances to drive a bar through them, could they, in your judgment, have been in the condition you found them in when you made these inspections?

A. No, sir. If they did they would have burned out.

Further Recross-examination.

Mr. LISTER.—Q. That being a misleading question, because it refers to certain testimony in the deposition, I will ask you this: The testimony in the depositions was that they could not drive a piece of pipe through these, which was almost exactly of

(Testimony of John K. Bulger.)

the same diameter; a piece of pipe, as you know. Mr. Bulger, if there is even a sixteenth of an inch of scale, and the piece of pipe you are driving through is nearly of the same diameter, that of itself would allow enough circulation of water through them?

A. If the pipe you were putting through was nearly the diameter of the tube there could not be much scale on.

Q. Suppose there was scale in some of them that you were trying to drive through, you could not drive a piece of pipe of nearly the same diameter through, and yet there would be a circulation of water?

A. Yes, sir, a circulation of water.

Q. If there was a circulation of water, this would not occur in the other tubes; is that correct? If there is circulation of water through the tubes they cannot become overheated.

A. Was the cleaner that was forced through the tube nearly the diameter of the pipe?

Q. That is the testimony.

A. Did the cleaner go through the tubes?

Q. It went through some and some it would not go through. Instead of a cleaner, they were using a piece of pipe nearly the same diameter as the tube.

A. If they could force that through, it would come nearly to cleaning the tube out. If they could not, the tube was not in condition.

Q. If they were forcing a piece of pipe through

(Testimony of John K. Bulger.)

this, we will assume a sixteenth of an inch square or a little more, and use a little piece of pipe to force it through, and it was accumulating this scale ahead, breaking it off and carrying it ahead of that, and they could not get it quite through, that scale would be forced into a lump somewhere in the tube, would it not?

A. It is according to whether the tube was straight or not. If there had been a little offset in that tube you could not force that pipe through it. If it was perfectly clean and there was an offset in that tube you could not force that pipe through.

Q. So that the fact that you could not force a piece of pipe of nearly the same diameter through would not show that all the tubes were in a condition that they would instantly have been burned out, would they?

A. I do not agree with you on that. Some of these tubes were buckled. Anybody who has had anything to do with the Babcock and Wilcox boilers knows that they will buckle. If you are forcing a piece of pipe of nearly the diameter through that tube, and there was a bend in the pipe, it may be perfectly clean, but you could not force that through.

Q. Would that not be a contradiction of the answer that you gave to Mr. Rosenheim a minute ago, that if you could not force a rod through, that the tube would be in such bad condition that it would necessarily burn out?

A. Let me correct that. If there was scale in the tube and you could not force it through, natur-

(Testimony of John K. Bulger.)

ally it would burn out.

The COURT.—That is what he assumed. Now, he is assuming that there was a very slight bend in the tube, and you undertook to force something through of the same diameter, you cannot do it.

Mr. LISTER.—Exactly. The only point I wish to make clear is this. The testimony in the deposition shows that a large number of these tubes they could not force a piece of pipe through. By inference and by deduction, you might assume that probably one-quarter of these tubes were in such a condition that they would necessarily have had to buckle and burn. If Mr. Bulger's first testimony was to stand, it would be that if they were in that condition, they must necessarily burn. What I want to show is that while you could not force a piece of pipe through in case there was a little bend or something like that, there might be sufficient circulation of water through that tube to keep it cool and not burn.

The COURT.—Call your next witness.

[Testimony of Edwin S. Hough, for Respondent.]

EDWIN S. HOUGH, called for the respondent, sworn.

Mr. ROSENHEIM.—Q. What is your residence? A. Oakland, California.

Q. What is your occupation?

A. Consulting engineer and marine surveyor.

Q. Do you know the steamer "F. A. Kilburn"?

A. I do.

(Testimony of Edwin S. Hough.)

Q. Were you around that steamer when she was built, or the boilers and machinery were installed?

A. I was on board some few times.

Q. Did you overlook the boilers and machinery?

A. Not officially.

Q. I mean unofficially. A. Yes, sir.

Q. What kind of a boiler was it, or what boilers were they? How many, and what variety?

A. There were two Babcock and Wilcox water-tube boilers of about 2000 feet each.

Q. I forgot to ask you a few minutes ago about your qualifications as an engineer; please state them.

A. I am the resident surveyor for the Bureau Veritas International Registry, Surveyor of Steamships; also superintending engineer for some of the steamship companies on the coast.

Q. What steamship companies?

A. The Pacific Transportation Company, the California and Oregon Coast Steamship Company, Consulting Engineer for the Hammond Lumber Company, and Trowe Brothers. And I act at time for the Metropolitan Steamship Company.

The COURT.—This is a matter of not very great materiality. It is to find out his qualifications.

The WITNESS.—I also survey at times for the Board of Marine Underwriters.

Mr. ROSENHEIM.—Q. How long have you followed the profession of yours?

A. Marine engineering?

Q. Yes. A. Twenty-seven years.

(Testimony of Edwin S. Hough.)

Q. Continuously? A. Yes, sir.

Mr. LISTER.—I should like to ask the witness a question or two.

Q. Have you ever had any practical experience as a marine engineer?

A. Yes, sir. I served my time in London, England.

Q. Were you licensed under the English government?

A. Second engineer, under the old rule.

Q. How long did you go to sea?

A. I was at sea just 14 months.

Q. What class of a vessel was that?

A. What they call under-power vessels, 25 years of age.

Q. Was that before time of the water-tube boilers?

A. Yes, sir. I have had charge of water-tube boilers in this port for ten years.

Q. As consulting engineer?

A. Yes, sir.

Q. Not as practical engineer?

A. Not at sea.

Q. Never had any experience in the active handling?

A. I have not been to sea with a water-tube boiler except on trial trips and tests.

Q. Have you had any experience in cleaning tubes of a water-tube boiler? A. Yes, sir.

Q. Personal experience? A. Yes, sir.

Q. What kind of a tool should you use?

(Testimony of Edwin S. Hough.)

A. Prior to the time we were able to get the rotary header, we used to get those tools furnished by the builders of the Babcock and Wilcox boilers.

Q. You have had experience in cleaning tubes?

A. I have been present at the regular cleaning of our Babcock and Wilcox boilers and those of similar manufacture.

Q. Your principal experience has been theoretical in regard to that?

A. If you call that theory, being on the spot, and assisting and directing, yes.

Mr. LISTER.—We will not object to his testimony.

Mr. ROSENHEIM.—Q. You have heard the testimony here to-day, haven't you?

A. I have.

Q. I should like to have you look at these exhibits.

Mr. LISTER.—If he is going to testify as an expert, I should like hypothetical questions put. I think that is the rule.

Mr. ROSENHEIM.—Q. I will show you these various exhibits. Have you looked through these, Mr. Hough? A. Not carefully.

Mr. LISTER.—Usually, in admiralty, there is no objection to the admission of testimony, the same as before a jury. I think an expert would come under a different rule, that the questions should be purely hypothetical.

The COURT.—I do not think any different rule should be applied. The general rule is that the tes-

(Testimony of Edwin S. Hough.)

timony of an expert should be upon hypothetical questions; that is, an expert should not be asked to give his opinion of the testimony that he heard. For instance, half a dozen witnesses come before a court and testify. He cannot be asked, "You have listened to that testimony, what is your opinion?" That would not be the proper way to do it. Of course, if there is conflict in the testimony, neither the jury nor Court could tell what testimony the witness disbelieved, what he gave credit to. That is the reason of the rule that you invoke.

Mr. LISTER.—I do not wish to be technical.

The COURT.—I do not think it is necessary here.

Mr. ROSENHEIM.—Q. Mr. Hough, assuming a case where the tube of one of these boilers was inspected by the United States Inspectors seven or eight months before the accident, and passed inspection satisfactorily; the tube was cleaned out every several weeks under the direction of a competent engineer, and later again the same steamer was placed upon the drydock here and the tubes cleaned out again, and no defect found therein, when inspected, and the steamer thereupon undertook a trip, was a hundred miles or so from port, and one of these tubes in the boiler, a Babcock and Wilcox boiler,—as I have stated, this appearance in it on any of these inspections, no defect superficially appeared—what in your judgment, was the cause of such a tube blowing out?

A. If there was a non-conductor on the water side of the tube, then the tube must be defective.

(Testimony of Edwin S. Hough.)

Q. Would it be a patent or latent defect under those circumstances?

A. I should believe that it would be a latent defect.

Q. Now, having examined these tubes, Mr. Hough, and it being admitted that these are the tubes in controversy, including the portion of the tube which ruptured, from your inspection of these tubes in their present condition, what is your opinion that must have caused the rupture of this tube, as to patent or latent defect?

A. I think that it would be due to one of two causes, or both. And that might be in the chemical qualities of the material, or it might be in lack of physical qualities which resulted from that.

Q. You say in the chemical qualities of the material. Kindly explain that matter.

A. I mean by that that the material should hold up to a certain chemical test which I cannot give, but I believe is adhered to by the Babcock & Wilcox people. And it should also withstand certain physical tests, either of which may have been defective in that material.

Q. You mean in the manufacture of tubes?

A. I mean in the chemical preparation of the steel which finally went into the bloom from which the tube will have been made, or it may have been in the rolling of the tube itself.

Q. Is it not a fact that using the utmost care, in the manufacture of tubes, and in fact other things that are made of steel or cast-iron, or wrought-iron,

(Testimony of Edwin S. Hough.)

that latent defects are found at times because of something that occurs in the manufacture without the knowledge of the manufacturer?

A. Yes, sir. We have frequent cases in shaft forgings, for instance, in marine work.

Q. And it is your opinion that this tube gave out because of some such latent defect as you have testified to? A. I can see no other reason.

Q. Coming back to what I was asking you about, the "Kilburn," you saw the machinery installed, I think you said? A. Yes, sir.

Q. As to the quality of the boilers, what quality did they seem to be?

A. I could not certify to the quality of the material in the boilers. They seemed to be of the standard Babcock & Wilcox design.

Q. Now, is the Babcock & Wilcox a high standard of tubular boilers.

A. I have always understood so. Our experience with their material seems to prove that.

Q. You say your experience? A. Yes, sir.

Q. What has that been?

A. We have three of their boilers which have proved very satisfactory.

Q. I will ask you whether or not it is an occurrence of some frequency for tubes to give out?

A. In those boilers which I have charge of we have had no experience of that kind.

Q. But is it not a fact that sometimes even on the trial trip of a vessel that a tube will give out in a new boiler?

(Testimony of Edwin S. Hough.)

A. I have not been present at any such case, but I have heard of them.

Q. You have recently heard of such, haven't you?

A. A local case, I think there was, a little time ago.

Q. Have you ever heard of such occurrence on the Government vessel "North Dakota"?

A. I heard of that case.

Q. In November this year on its trial trip at Portsmouth, New Hampshire? A. Yes, sir.

Q. Now, Mr. Hough, there has been some testimony here about the boiler being taken practically apart and cleaned out in that way frequently, and that that would be the way to clean out these tubes. Is that the way that tubes are cleaned out in these?

A. We have not practiced in that way.

Q. Is it not a fact that for aught that we know that in a tube like that there might be some latent defect not discoverable? A. Very possible.

Q. Or any other tube in a tubular boiler?

A. Or in any other material.

Cross-examination.

Mr. LISTER.—Q. I show you here a tube. Do you observe the angle of that tube?

A. Yes, sir.

Q. The curve in it? A. Yes, sir.

Q. Do you assume that that curve was created by a chemical defect in the iron, or a physical defect, such as overheating?

A. That might be due to neither of those causes

(Testimony of Edwin S. Hough.)

that you mention. Can you tell me where it came out, what position of the boiler?

Q. Supposing it to be the third tube from the bottom over the fire.

A. What is its position with reference to the collapsed tube?

Q. Supposing it is the collapsed tube, a piece of the collapsed tube? Would you assume that this portion of the collapsed tube and this curve that is formed in it, this appearance, came from a chemical defect, or originally would you suppose it was an overheating of the tube?

A. It might be a physical defect.

Q. Originally would you regard that as from overheating, to create that?

A. I should want to consider the matter a little longer before expressing an opinion.

Q. You cannot express an opinion as to the appearance of that tube, whether it is from overheating?

A. Is that a portion of the tube which collapsed?

A. There is no collapsing in this tube at all. It is an explosion. There is a collapsing in the tube of a Scotch boiler.

A. I had better use another term, a rupture. Is that the ruptured tube?

Q. This, as I understand, is a piece of the ruptured tube.

A. The dent or bend in the tube might have come about, we will suppose that the tube struck something in the furnace.

(Testimony of Edwin S. Hough.)

Q. I will ask you another hypothetical question: Following the rule laid down here in regard to this tube, assuming that a tube such as this had in it an obstruction, whether it was due to scale or any other obstruction, so that there was no circulation of water, the pressure on either side of that obstruction would equalize it, would it not? A. Yes, sir.

Q. If there was any obstruction at all there would be no circulation? A. No circulation.

Q. The result thereupon would be to form a vapor by degrees, if not instantly in the tube, would it not?

A. I am not prepared to state that that is the case.

Q. If this tube is under intense heat and an obstruction is in the center of it, it would turn into steam, would it not?

A. If there is no supply from the header, yes.

Q. It is on an inclined position, so that the bubbles of steam may go upwards? A. Yes, sir.

Q. If there is an obstruction in the tube so that the circulation of water that is coming from the bottom and going upwards is cut off from this point upwards instead of being water, there would be merely vapor in the tube?

A. That cannot be proved.

Q. I am not stating what could be proved. I am asking you what would result as a physical question?

A. If we could determine there was absolutely no circulation back into that upper portion of the

(Testimony of Edwin S. Hough.)

tube, then we could admit that it would be steam and not water.

Q. I am asking you a hypothetical question: you are not testifying on behalf of the defense. Are you prejudiced in favor of the defendant?

A. No, sir.

Q. You are willing to testify as an expert?

A. Yes, sir.

Q. Then I ask you a hypothetical question. Here is a tube with an obstruction in it, with a hot boiler, where the temperature is from 1600 to 1800 degrees; what would the result be on the remaining portion of that tube?

A. If all the water was drawn out of that, then there would be nothing to assist the tube in keeping down below a dangerous temperature.

Q. Would the tube still have a pressure?

A. The pressure would still be there.

Q. There would be no circulation of water to cool it? A. None.

Q. Would the tube become malleable?

A. It would become soft.

Q. Would it lengthen and buckle?

A. It would bend.

Q. Had it lengthened and buckled, would it become thin and burst?

A. That would be the tendency.

Q. As a matter of fact, what is the temperature of the fire-box in one of these water tube boilers?

A. At that particular point, near the back end, it would probably reach 1900.

(Testimony of Edwin S. Hough.)

Q. Do you know the temperature of one of our ordinary incandescent lights?

A. I cannot certify to it.

Q. Do you know the temperature of an orange colored ray? A. I cannot certify to it.

Q. Is it not a fact that one thousand degrees of temperature iron begins to glow a cherry red?

A. Yes, sir.

Q. At 1500 we get the first orange rays?

A. Yes, sir.

Q. At 1900 the temperature of which you are speaking would be almost a white heat, would it not? A. Yes, sir.

Q. It would therefore make this iron as malleable as putty? A. It would be malleable.

Q. It would have no tensile strength whatever?

A. That would be considerably reduced.

Q. At what temperature does iron flow?

A. This is steel.

Q. What temperature does steel burn?

A. I am not prepared to certify.

Q. At a certain temperature steel burns with great readiness, does it not?

A. Yes, sir, the life is out of it.

Q. Is it the fact that the brilliant spark of fireworks is made by the insertion of steel filings?

A. Yes, sir.

Q. Those steel filings are then burned?

A. Yes, sir.

Q. At about 1900 degrees steel will burn?

A. It would be so reduced in its tensile qualities

(Testimony of Edwin S. Hough.)

as to be practically useless.

Q. Assuming in this tube there was an obstruction caused by scale or any other substance, this result would occur? A. It is possible.

Redirect Examination.

Mr. ROSENHEIM.—Q. Do you see any evidence in these tubes to indicate there was an obstruction caused by scale or anything else?

A. I see none.

Q. Had there been such an obstruction what would have become of the obstruction on the blowing of the tube?

A. That would have been blowed into the furnace.

Recross-examination.

Mr. LISTER.—Q. If there was an obstruction in that tube the pressure would be evenly balanced on each side of it, would it not? A. Yes, sir.

Q. The only tendency to stop it would be the slight difference in the height of the water. There would be merely the circulation of the water and that would have no great tendency to remove it?

A. If the tube opened up.

Q. I am speaking of before the tube opened up. The obstruction would be balanced by the pressure on either side? A. Yes, sir.

Q. After the explosion or the rupture the pressure would be reduced on one side of the construction. It would be blown out?

A. Slightly reduced, blown out and under the boiler pressure into the furnace.

[Testimony of Charles L. Grundell, for Respondent.]

CHARLES L. GRUNDELL, called for the respondent, sworn.

Mr. ROSENHEIM.—Q. What is your occupation, Mr. Grundell? A. Marine engineer.

Q. How long have you been such?

A. Since 1884.

Q. Now, with what company, if any are you working?

A. For the Babcock & Wilcox people as erector and repairer.

Q. How long have you been in that occupation?

A. Five years.

Q. What is your specialty?

A. Repairing, looking after repairings and such like, and installing boilers; assembling them.

Q. Their boilers are tubular boilers?

A. Yes, sir.

Q. You have heard some testimony here. There has been some you heard, I presume, on the question of practically taking apart a boiler in order to clean out the tube. Is that the way they are cleaned out?

A. No; with a scraper or a turbine.

Q. You heard Mr. Flinn, the engineer, testifying about the scraper which he used?

A. Yes, sir.

Q. Was that the scraper such as was furnished by the Babcock & Wilcox Company?

A. Yes, sir, with the boiler.

(Testimony of Charles L. Grundell.)

Q. For the purpose for which he used it?

A. Yes, sir.

Q. Mr. Grundell, you have examined these tubes, have you not?

A. I have seen that tube when it was taken out, when it arrived in port on that trip.

Q. After the accident? A. Yes, sir.

Q. At the office of the inspector?

A. No, sir; aboard of the ship.

Q. Did you form an opinion as to whether it was caused by a latent or patent defect?

A. I should say latent.

Q. And what do you mean by latent defect?

A. That the iron in manufacturing some way became defective.

Q. That happens at times in these constructions?

A. That is the first to my experience that anything happened like that.

Q. I want to take up the question of inspection. Have you paid some attention to the frequency with which inspections are made on steamboats having boilers of this kind? A. Yes, sir.

Q. In San Francisco Bay, for instance, has your attention been called to the method on frequency of inspection in certain vessels, as, for instance, the Key Route steamers?

A. The United States Inspectors make their annual inspection, and I myself go aboard probably once a month each of the boats while running. Then while laid up I examine the boilers and look through them.

(Testimony of Charles L. Grundell.)

Q. Do you know how often the engineers make inspections?

A. The boilers run about six months on a run. Then they lay up for cleaning probably a month. They have extra boats and lay them up about a month.

Mr. LISTER.—Q. Is that the Key Route boats?

A. Yes, sir.

Mr. LISTER.—What has that to do with this case?

Mr. ROSENHEIM.—Nothing. Simply showing the question of the usage in this behalf.

Q. What kind of boilers do they use in those boats? A. On the "Claremont"—

The COURT.—The question you want to find out is, how often should those tubes be inspected; what kind of inspection should be given to them; what kind of care should be taken for the purpose of observing their condition, knowing what their condition is; what is a reasonable requirement. That is what you want to get at.

Mr. ROSENHEIM.—Yes.

Q. You heard the statements of his Honor. Will you kindly answer them?

A. I consider about once a month is often enough to look through the tubes.

The COURT.—Q. In looking through them what ought to be done in order to determine their condition?

A. Take a plate off either end. You can hold a candle and look right through them. In straight

(Testimony of Charles L. Grundell.)

tubes you can look right through them, they are all straight tubes, only nine feet long, and you can readily see any obstruction in them. There are plates on both ends.

Mr. ROSENHEIM.—Q. Have you stated fully about the method of examining the tubes on these inspections?

A. When a tube is defective, that is, where I have to take a tube out, or examine the boiler for defects, I usually find them on the ends where they have been rotted, or if there is any pitting, I find that with a scraper; it is readily detected.

Q. What method is adopted for examining the tubes in the middle of the boiler, not on the outside?

A. You can see through all of the tubes by taking the plate off opposite either end. They are in clusters of four. You can see through four by holding the candle on the opposite side.

Q. Is that the manner that Mr. Flinn testified to have adopted? A. Yes, sir.

Q. By taking the plate off you do not mean taking the boiler apart? A. No, sir.

Q. Or taking the ends off generally?

A. No, sir; just the handle plate. There is a cluster of four tubes in front of that handle plate.

Q. Do you find any signs of degeneration in this steel by reason of the use?

A. No, sir, it is perfectly good.

Q. And that applies to the other tube also, does it? A. Yes, sir.

(Testimony of Charles L. Grundell.)

Q. And have you any knowledge of the tubes in the boilers, their condition generally?

A. I visited her inside of three months previous to the accident when they were cleaning, watched them clean several tubes, and went off about my business. It is my business to visit all these ships that come into port.

Q. That is, ships having your boilers?

A. Yes, sir; if it is only for ten minutes or a half hour.

Q. What was the condition that you found these in?

A. The boilers were perfectly clean.

Q. By that you mean they were free from scale?

A. Free from scale to do any damage.

Q. Free from anything that would cause any difficulty? A. Yes, sir.

Q. You saw no sagging or bulging or anything of that kind? A. No, sir.

Q. Could you explain to the Court from any specimens that you have here of tubes the difference caused by a split coming from scale or from other causes?

A. Yes, sir; where scale forms.

Q. Have you got those pieces here?

The COURT.—Let the witness answer.

A. Where a four-inch tube of the lower row, and scale lodges there, it sags down and generally burns, a little hole will come there and blow, and might blow for two or three days.

Mr. ROSENHEIM.—Q. What are these?

(Testimony of Charles L. Grundell.)

A. Samples of tubes that I have taken out (producing). There is one blistered on the bottom. That is as far as they go. They burn right off. The blister burns, and the steam will blow through.

Mr. ROSENHEIM.—We will offer that in evidence.

Mr. LISTER.—Q. This is the evidence of burned steel by reason of scale in the interior?

A. Yes, sir.

Mr. LISTER.—No objection whatever.

Mr. ROSENHEIM.—Q. Where does that come from?

A. Out of the steamer "Ascension."

Q. What is this (pointing)?

A. That was cut out, due to the amount of fuel used; too much fuel; there is still a circulation there.

Q. You found no evidence in these tubes of any inordinate quantity of scale? A. No, sir.

Q Nothing to indicate that this tube burst because of the presence of scale?

A. Nothing whatever.

Q. Or any other foreign deleterious substance?

A. As far as was in my power to see.

Q. When I speak of these tubes, I mean the tubes taken from the "Kilburn" and not the ones taken from the other steamers?

A. I have never taken anything but four-inch tubes.

The COURT.—Q. These tubes in evidence?

A. They were taken out by the chief engineer.

Q. He is asking you whether there is any evi-

(Testimony of Charles L. Grundell.)

dence of scale? A. Not to do any damage.

Mr. ROSENHEIM.—Q. Or in this exhibit No. 4? A. None whatever.

Cross-examination.

Mr. LISTER.—Q. Do you call this in this exhibit a latent or patent defect (pointing to Exhibit No. 8)?

A. That is the effect due to scale.

Q. Is it a latent or a patent defect?

A. I did not call it; I said it was a fracture.

Q. You have testified that where the tube is worn thin and burst out is unquestionably a latent defect. Is this also a latent defect when it is caused by scale?

A. I don't know whether you call it latent defect. It is caused by scale.

Q. Why do you call this a latent defect when you do not know whether that is?

A. That is due to heat, overheating.

Q. Do you wish to correct your statement?

A. I would call it a latent defect, a defect in the manufacture of the iron.

Q. Do you call this a latent defect (pointing)?

A. No, sir.

Q. In this case the iron or steel is worn very thin, is it not—blistered?

A. No, sir; it is bulged out and burned off.

Q. It has been overheated? A. Yes, sir.

Q. And the pressure has bulged it out?

(Testimony of Charles L. Grundell.)

A. Yes, sir.

Q. Do you see the scale on that?

A. Some scale, but it has been removed. When that tube was taken out, there was probably half an inch of dirt on there.

Q. That dirt made that bulge?

A. Yes, sir.

Q. Is that scale heavier than this in the ordinary portion of the tube? A. Yes, sir.

Q. Is it any heavier than this (pointing)?

A. Much heavier than this.

Mr. LISTER.—I consider this twice as thick as that (pointing), if your Honor will look at it. Here is the scale in this one which shows distinctly. You can see it as compared with those two. There is the scale on this.

Q. Supposing that the scale or dirt was more extensive on this piece of tube than it was on that little piece, would it not have the same effect, of burning this thinner like that (pointing)?

A. No, sir.

Q. Why?

A. It would burn and bulge down and blow, never burst.

Q. Supposing that it burned over a large area, the same this so that it burned thinner; why should it only make a small hole instead of a big hole?

A. In my experience, that is the way they all go. When they burn, they give you ample warning by starting to blow and leak.

(Testimony of Charles L. Grundell.)

Q. How many tubes have you had experience in burning? A. Never any.

Q. How many of the other nature have you had? A. Four-inch?

Q. Two-inch tubes? A. Never any.

Q. You have had no experience about these?

A. I have had experience in taking them out.

Q. I will show you a piece of your exhibit, of which I do not know the number—you took that out of an actual exhibit, out of a tube?

A. Yes, sir.

Q. Was that hole in it? A. Yes, sir.

Q. And the tube was not burned at all?

A. No, sir.

Q. Supposing that the hole finally closed up; tell us what would have been the result.

A. It is hard to tell what it would do.

Q. If you are an expert I want you to testify?

A. I do not claim to be an expert; I am just a repairer.

Q. You are testifying now as an expert, I presume.

A. I would say that it would simply scale off.

Q. Supposing that that hole closed completely up, what would be the result?

A. There would be no circulation.

Q. When you have a tube in the hot flame and no circulation, what happens?

A. The iron will burn away, scale away.

Q. Grow thinner and thinner?

A. Yes, sir.

(Testimony of Charles L. Grundell.)

Q. There would be the pressure on it and the tube getting thinner all the time?

A. Yes, sir.

Redirect Examination.

Mr. ROSENHEIM.—Q. You say the scale was removed from that (pointing to Exhibit 8)?

A. Yes, sir, in taking it out.

Q. And a thick scale in it? A. Yes, sir.

Q. How thick?

A. I should say about half an inch.

[Testimony of Charles H. Bates, for Respondent.]

CHARLES H. BATES, called for the respondent, sworn.

Mr. ROSENHEIM.—Q. Mr. Bates, were you connected with the steamer "Kilburn" at the time of the accident? A. Yes, sir.

Q. In what capacity?

A. First assistant engineer.

Q. You reside where?

A. 2132 Bryant Street, San Francisco.

Q. How long have you been engineer prior to that time?

A. Four or five years—four and a half.

Q. And how long have you worked on the "Kilburn"? A. Between two and three months.

Q. What was the method adopted to clean of the tubular boilers, if you know?

A. In what respect?

Q. With reference to cleaning them out, how often were they cleaned out.

(Testimony of Charles H. Bates.)

A. Every time we had an opportunity, which varied between two and three weeks.

Q. And the entire boiler was cleaned out?

A. As much as we could get over, generally one boiler.

Q. One boiler at a time?

A. One boiler always at a time.

Q. And what was used in cleaning?

A. A scraper, and afterwards washed out.

Q. Under whose direction was this work done?

A. The chief engineer.

Q. I will ask you whether or not those tubes choked up with scale or foreign substance?

A. Not to my knowledge. I never saw any scale to amount to anything in them.

Q. You never saw any scale to amount to anything I got in?

A. Yes, only the usual amount in those kind of tubes.

Q. No quantity that could cause any damage?

A. No noticeable quantity.

Q. How often did you look at them?

A. I always did before the second assistant closed them up, and the chief engineer did the same.

Q. You inspected them?

A. I went over them with the chief.

Q. There is something in the deposition about something having been hammered through tubes there, a pipe or something like that; do you know of anything like that happening?

A. If anything of that kind would have occurred

(Testimony of Charles H. Bates.)

I certainly would know.

Q. You do not know anything of that kind?

A. No, sir.

Q. Nothing of that kind was done under your direction or the direction of the chief engineer?

A. No, sir.

Q. At any time? A. At any time.

Q. These boilers were Babcock & Wilcox boilers?

A. Yes, sir.

Q. A standard type of boiler?

A. Yes, sir.

Q. A high-class boiler? A. Yes, sir.

Q. The same boilers which were installed in the steamer at the time she was constructed?

A. To the best of my knowledge they were.

Q. Did those boilers give any trouble?

A. Nothing more than the usual trouble that you have with boilers of that kind.

Q. And what was the condition generally of the tubes?

A. The condition generally was good to my knowledge.

Q. Do you know anything about the cleaning out of these tubes when the vessel was over on the dry-dock, Boole's shipyard, shortly before the accident?

A. They were all cleaned; I worked in the engine-room with the oilers; and the second assistant had charge of that work.

Q. Did you ever learn of any tube sagging or anything of that kind?

A. I never knew anything to be wrong with them whatsoever.

(Testimony of Charles H. Bates.)

Q. No obstruction of any kind?

A. No obstruction of any kind whatsoever.

Q. Not at any time? A. Not at any time.

Q. What was this man Constantine detailed to do?

A. Constantine was working with me in the engine-room; he was my helper in the engine-room.

Q. To the best of your knowledge did he have anything to do with cleaning out the tubes?

A. He could not very well; he was working with me the most of the time.

Q. You have no knowledge of any work being done by him in the cleaning out of the tubes?

A. Not to my knowledge.

Q. You never saw him do it?

A. I never saw him.

Q. Who did clean them out?

A. The second assistant and the chief's brother.

Q. Mr. Flinn? A. Yes, sir.

Q. Is he present in court?

A. Yes, sir. And also Mr. Hanos assisted to clean them out.

Q. You mean the libelant here?

A. Yes, sir.

Q. When did you see him cleaning them out?

A. I could not state exactly when.

Q. Is it not a fact that he took a hand in the cleaning out of these tubes only when she was at Boole's shipyard? A. I believe he helped at intervals.

Q. To the best of your knowledge he did?

A. To the best of my knowledge he did.

(Testimony of Charles H. Bates.)

Q. You went over these tubes and inspected them yourself?

A. I did, with the chief; he supervised it.

Q. You, together with the chief, inspected them?

A. Yes, sir.

Q. Did you see on any tube any evidence of imperfection or flaw?

A. Nothing whatsoever.

Q. You discovered nothing of the kind on any inspection made by you? A. No, sir.

Q. And to the best of your knowledge there was no patent defect of any kind?

A. Nothing that I could notice.

Q. Nothing that you could see?

A. No, sir.

Q. This tube is bent (pointing). How did that come to be bent, if you know?

A. As near as I can recollect, when we started to take that tube the stanchion was in the way, and we had to bend it in, and had to give it another bend to clear the eccentric rods.

Q. So it was bent in that manner?

A. Yes, sir.

Cross-examination.

Mr. LISTER.—You are a licensed officer?

A. Yes, sir.

Q. If there was any negligence in this case proved, you would lose your license, I presume. It is a supposition.

Q. It is to your interest and to the interest of the

(Testimony of Charles H. Bates.)

chief to show there was absolutely no negligence in regard to having scale in this boiler?

A. Yes, sir.

Q. When you went over to Boole's shipyard, are you willing to swear positively that Constantine did not help the second assistant. Remember, I want this absolutely. Are you willing positively to swear that Constantine, the oiler, did not assist and help the second assistant in cleaning the tubes of that boiler?

A. He might have helped him at certain intervals. I do not say he was working with me all the time. He was working with me in the engine-room.

Q. You are not willing to swear he perjured himself when he says in his deposition he helped the second assistant at that particular time?

A. I don't know what his deposition was.

Q. Then you are not willing to state that he did not help the second assistant?

The COURT.—His testimony so far is that he cannot say that he did not occasionally help him, but that was not his business. His business was to help him.

Mr. LISTER.—I know, but we have the deposition of Constantine.

The COURT.—That does not make any difference. All this witness testified to is that Constantine may have occasionally helped him.

Mr. LISTER.—If he does that, there is no objection.

The WITNESS.—That is what I said.

(Testimony of Charles H. Bates.)

The COURT.—I take it from his statement; it would only be for a short time; that he might for a short time assist, but his real work was in the engine-room.

Mr. LISTER.—Q. The second assistant is called usually in the cleaning of the tubes?

A. Yes, sir.

Q. You had charge of the engine-room?

A. Yes, sir.

Q. In reality you had very little to do with the boilers?

A. I did not have a large amount of work in there. Occasionally the second assistant would call me in to look at something.

Q. Is it not a rule that the first assistant ordinarily on these steam schooners takes charge of the engines, and the second assistant takes charge of the fire-room? A. Ordinarily.

Q. The engines took pretty near all of your time?

A. A large portion of it.

Q. In addition to that you had the winches on deck and the steering-gear? A. Yes, sir.

Q. And you are called to various parts of the ship? A. All auxiliaries.

Q. Often for long periods of time in port?

A. It will depend on the job. Occasionally there would be a lengthy job.

Q. Were you on the drydock? A. Yes, sir.

Q. Did you look out for the propeller, examining the propeller? A. No, sir.

(Testimony of Charles H. Bates.)

Q. The chief attended to that? A. Yes, sir.

Q. The work of the chief on the drydock took up nearly all his time? A. Not necessarily.

Q. Did it in this case?

A. No, sir; it did not take all his time.

Q. It took a good deal of his time?

A. I don't know what you would call a good deal. He paid occasional visits down there.

Q. How long were you on drydock?

A. As near as I can recollect, I think something like three or four days.

Q. Do you know ordinarily when this boat got into port, how many tubes they cleaned?

A. Ordinarily?

Q. Yes.

A. That would be hard to say, accurately; we cleaned as many as we could. On this occasion this one particular boiler was cleaned on the drydock.

Q. Are you sure?

A. To the best of my knowledge. I have the second assistant's word for it.

Q. Only by hearsay?

A. I could not be out there. I have his word for it. He told me he had finished.

Q. You know nothing about whether they were all cleaned or not?

A. By looking through them.

Q. Did you look through them all?

A. As far as I could. The chief looked through the rest of them.

Q. How many was that?

(Testimony of Charles H. Bates.)

A. I looked through all the front.

Q. How many was that?

A. The whole front.

Q. There are 350 tubes in that boiler?

A. Yes, sir.

Q. Did you hear the chief testify this morning it took 15 minutes for each small tube?

A. We did not stop very long; we glanced through them.

Q. The chief testified this morning that it took 15 minutes to clean each small tube? A. Yes, sir.

Q. That would be four tubes an hour, 32 a day? It would take you 14 days to clean those tubes?

A. Yes, sir.

Q. How long were you engaged in cleaning them?

A. Three or four days, as nearly as I can recollect. Every tube doesn't take 15 minutes. The higher the tubes are the quicker they are cleaned. Some tubes you can push the scraper right through them, and that tube is in fairly good condition.

Q. Where there is any scale in the tube and you have to remove it, can you push it right through?

A. I did not notice scale in the tubes; mostly mud.

Q. Does not this tube show scale? Was the scale any heavier than that?

A. Not to my knowledge.

Q. I want to ask you, the scraper which you had, would it have taken that scale off, or would it have taken the mud off on top of the scale?

A. It would take the scale and mud.

Q. In 15 minutes can you remove with that

(Testimony of Charles H. Bates.)

scraper that scale?

A. They were not all in that condition.

Q. That is one?

A. That is a little thicker than the ordinary.

Q. How long would it have taken that scraper to have removed that scale, scale as thick as that?

A. I cannot say exactly; probably 5 or 10 minutes.

Q. Could you do it by hand?

A. Not very well.

Q. Would you use a hammer?

A. I would not.

Q. Would a hammer have to be used?

A. No, sir.

Q. Is it possible for a man to force that scale through without using a hammer.

A. Yes, sir; we have done it.

Q. Take off from that a fraction of an inch at the present time.

A. That has been standing a long time and it is hard. I don't suppose that I could do it now.

Q. Take off a sixteenth of an inch of that scale with that knife?

A. Here is a quarter of an inch right here.

Q. Take it all around. How long is one of these tubes? A. I should judge about nine feet.

Q. And the scraper is circular?

A. Yes, sir.

Q. What is the circular diameter of the interior of the tube? A. As it now stands now?

Q. Yes.

(Testimony of Charles H. Bates.)

A. I should judge it would be about two inches.

Q. That would leave an inside circumference of about 6 inches, a little over 6 inches?

A. Yes, sir.

Q. That scale removed would have to take off 6 inches of scale at one time going through that?

A. Yes, sir.

Q. You think you could do it in less than 15 minutes?

A. I could not state that positively. We did the best we could with them; got them in good shape.

Q. You think a scraper could be forced through that tube by hand without hammering?

A. Yes, sir.

Q. You are not sure it could be?

A. It has been demonstrated.

Q. I should like to see it demonstrated.

Redirect Examination.

Mr. ROSENHEIM.—Q. You are not now on the "Kilburn"? A. No, sir.

Q. And you are not now following your profession? A. No, sir.

Q. You were also exonerated by the inspectors on this proceeding that took place after the accident?

A. Yes, sir.

Q. What is your present occupation?

A. Police officer.

Q. In this city and county? A. Yes, sir.

Q. As I understood you, you inspected these tubes at that time? A. Yes, sir.

(Testimony of Charles H. Bates.)

Q. And it is not possible, is it, to get tubes cleaner than these are.

A. They always have a slight accumulation of scale on them. It is a benefit to the tube to have it.

Q. I understand you to say they are as clean as tubes can be that are used? A. Yes, sir.

[Testimony of Albert Flinn, for Respondent.]

ALBERT FLINN, called for the respondent, sworn.

Mr. ROSENHEIM.—Q. Mr. Flinn, you were connected with the "Kilburn" at the time of this accident?

A. Yes, sir; I was an oiler on the "Kilburn."

Q. How long had you worked on that steamer before the accident? A. Eight months.

Q. In what capacity? A. Oiler.

Q. What do you know, if anything, about the cleaning of the tubes in the boilers of the "Kilburn"?

A. When I worked there we always cleaned them with a scraper; never used a hammer.

Q. So that if there is any testimony about a bar or hammer, that is not true? A. No, sir.

Q. How often did this cleaning take place.

A. Sometimes, if we got a chance, we tried it every three weeks; sometimes every two weeks.

Q. You would proceed from one boiler to another and clean them out during those intervals?

A. Yes, sir.

Q. Do you know whether the libelant here, Hanos, ever took part in the cleaning of the tubes?

(Testimony of Albert Flinn.)

A. Yes, sir.

Q. Did he do so at Boole's shipyard?

A. Yes, sir.

Q. Prior to the time that the steamer made this trip in which he was injured?

A. That is what the fireman is hired for, to help clean boilers.

Q. Did you ever find in any of these tubes any unusual quantity of scale? A. No, sir.

Q. Or any obstruction of any kind?

A. No, sir.

Q. Either at the time that the steamer was at Boole's shipyard or at any other time?

A. No, sir.

Q. Never anything of that kind? No, sir.

Q. Please state, if you know, how this tube came to be twisted (pointing).

A. It was up against the stanchions, in getting it out, we could not get that out and had to bend it to get it out. We used a bar on it to get it out.

Q. And bent it in that way? A. Yes, sir.

Q. You were there at the time?

A. Yes, sir. I was working in the fireroom at the time.

Q. Who else was there?

A. Three firemen and that gentleman there—I don't know the names; they are pretty hard names to think of—and myself and the second assistant.

Q. Do you mean the libelant Hanos?

A. Yes, sir.

Q. Do you know whether this witness Constan-

(Testimony of Albert Flinn.)

time helped in the cleaning out of the tubes over there at Boole's shipyard?

A. No, sir; not at that time he did not.

Q. If he did you never saw them.

A. I never saw him. I was detailed there all the time.

Q. What was he doing during all that time?

A. Always working in the engine-room with the first assistant.

Q. Now, then, how many tubes were cleaned when the vessel was over at Boole's shipyard?

A. We cleaned the whole after-boiler.

Q. How many were working at it?

A. Three firemen and myself and the second assistant was foreman of the job at that time.

Q. There were five of you at the time?

A. Yes, sir.

Q. And working rather continuously.

A. Yes, sir.

Q. At that work? A. Yes, sir.

Q. Now, state what, if anything, you know about any examination which might have been made after the boilers were cleaned by the chief engineer, the assistant engineer or anybody else?

A. I never heard nothing.

Q. You were not there. A. No, sir.

Q. Where is the second assistant now?

A. It is hard to tell. I have not seen him since I left the ship. I am not on the ship.

Q. This inspection was not part of your duty?

A. No, sir; it was none of my business. I know

(Testimony of Albert Flinn.)

nothing about it.

Q. What is your occupation at this time?

A. I am in the shop, finishing out my trade.

Q. Here in San Francisco? A. Yes, sir.

Q. You have no connection now with the steamer "Kilburn"? A. No, sir.

Cross-examination.

Mr. LISTER.—Are you sure it was that boiler that was cleaned in Boole's shipyard?

A. Yes, sir.

Q. Which boiler was it?

A. The after-boiler.

Q. You are sure of that? A. Yes, sir.

Q. How many men were working on the cleaning of these tubes?

A. We would give one another a blow at it. We would change about.

Q. How many men were engaged on the scraper at one time? A. One man.

Q. And the five of you took turns?

A. Yes, sir. While one was attending to that, the other man was putting gaskets on the plates. There was always something to do. We would help all around.

Q. You heard your brother's testimony that it took about 15 minutes to clean a tube?

A. I did.

Q. Was that correct?

A. Yes, sir, it was correct.

Q. How did you figure you could clean 350 tubes at the rate of 15 minutes per tube inside of two days?

(Testimony of Albert Flinn.)

A. Some of them you can run it through, there is hardly any dirt; some there is a little more, more or less.

Q. Did the scraper remove the scale that was in the boiler? A. Yes, sir.

Q. Or did it just simply remove the mud, the soft slime from the tube?

A. What the scraper removed, there was no more in the tube to remove.

Q. Did you hear your brother's testimony that there was scale left in the tube? A. Yes, sir.

Q. Did you divide that scale when you cleaned them, leaving half of the scale on and half *on*?

A. Sometimes there may be a little bit of mud like that: it is not scale, all mud.

Q. Your brother testified that you did not remove the scale but only the mud over the scale.

A. What scale there would be would not be worth removing.

Q. That is merely your opinion?

A. Yes, sir.

Q. If this tool would have compressed and merely taken off the soft stuff and left the scale—

A. It would take all the mud out.

Q. This tube shows a certain scale in it. Your brother has testified that that scale is beneficial and prevents pitting?

A. Yes, sir, I understand that.

Q. And he did not want that removed?

A. That is not big thick scale.

Q. So that consequently you did not remove the

(Testimony of Albert Flinn.)

scale?

A. There was no scale to be removed.

Q. I would like you to distinguish between no scale and thick scale. You did not attempt to remove the thin scale, your brother has alleged. How did you discriminate between scale a sixteenth of an inch and scale a thirty-second of an inch—how did you discriminate between the two scales, the scale he wanted left and the scale he wanted removed?

A. We pulled it out with a scraper and washed it out.

Q. That is all you did? A. Yes, sir.

Q. The scraper did not remove anything but the soft red dirt that you have spoken of?

A. Yes, sir.

Q. And not the scale?

Mr. ROSENHEIM.—It seems to me that the witness has answered that three or four times.

The COURT.—I think so.

A. As the chief engineer says, what is left there preserves the tube.

Mr. LISTER.—Q. Then you did not try to remove the scale at all? A. No, sir.

Redirect Examination.

Mr. ROSENHEIM.—Q. As I understand you, there was no scale of any consequence in any of these tubes? A. No, sir.

Q. At any time? A. No, sir.

Q. Never saw any, or any other obstruction?

A. No, sir.

(Testimony of Albert Flinn.)

Q. And the tube was cleaned out as you have testified to as frequently as you have stated?

A. Yes, sir.

Q. There has been some testimony here—I do not know whether you can answer this question—do you know anything about some tubes having been taken off of the forward boiler?

A. No, sir, I do not.

Q. You know nothing about that?

A. No, sir.

[Testimony of John F. Flinn, for Respondent (Recalled).]

JOHN F. FLINN, recalled.

Mr. ROSENHEIM.—Q. Mr. Flinn, you have heard some testimony here about some tubes having been taken out, three or four, or four or five. Which boiler were they taken out of?

A. Out of the forward boiler; just about a year ago.

Q. Not the boiler out of which this tube came?

A. No, sir; no tube had been *tube* out of the after-boiler outside of the ones that were fractured.

Q. Those tubes that Mr. Bulger spoke about?

A. Yes, sir.

Q. Taken out of the forward boiler?

A. Yes, sir.

Q. A different boiler entirely?

A. That was due to the carelessness of the second assistant engineer, and they revoked his license for six months.

(Testimony of John F. Flinn.)

Q. When did that happen?

A. A year ago in Eureka.

Q. What can you tell us about the bent condition of this tube?

A. This first tube, it let go in the morning, this fractured tube. We put in a new tube and got steam up. The second tube let go at 10 o'clock at night while laying at anchor at Monterey Bay, as far as I can remember, after blowing the boiler down and taking the second out, there was a stanchion in the fireroom and engine-room, and in taking this tube out this stanchion was in *the was* so we finally brought it back; we had a little more room in the engine-room, and it came in contact with the stanchion and the revolving gear. We got a bar and bent it down. After getting clear of that we came up against this connecting rod and bent it again.

Cross-examination.

Mr. LISTER.—Q. You said this morning these tubes were in the same condition as when taken out of the boiler. Your testimony was never in this shape until after Mr. Bulger testified this morning to the sagged condition of the tubes?

A. I was never asked about that.

Q. You stated they were in the same condition?

A. No, sir. I said nothing of the kind.

[Testimony of Edward S. Hough, for Respondent (Recalled).]

EDWARD S. HOUGH, recalled.

Mr. ROSENHEIM.—Q. There has been some

(Testimony of Edward S. Hough.)

testimony about the life of a Babcock & Wilcox boiler. What do you know, if anything, about the life of a Babcock & Wilcox boiler?

A. We have two that are ten years old last July. We see no signs of deterioration other than is due to the usual wear and tear.

Q. So that according to your knowledge they last 10 years?

A. Certainly. We are carrying the same steam pressure to-day that the boilers came out with.

Cross-examination.

Mr. LISTER.—Q. What is the life of a tube in a boiler?

A. We have the same tubes that the boiler came out with. I am unable to tell the life of a tube.

Q. Did you hear the chief engineer testify that it was a record for him to burn his tubes for six years? A. I heard him say so.

Mr. ROSENHEIM.—We rest, if your Honor please.

Mr. LISTER.—I have a question to ask the libelant, but the Greek Consul is not here.

Mr. HUTTON.—What is the question?

Mr. LISTER.—That Constantine was working and cleaning tubes.

We have another interpreter here.

[Testimony of Basilios Hanos, for Libelant (Recalled).]

BASILIOS HANOS, recalled.

(CHRIST TORRES was sworn as interpreter.)

Mr. LISTER.—Q. Did Mr. Constantine work on

(Testimony of Basilios Hanos.)

cleaning the tubes of this boiler?

A. Yes, sir. He was all the time cleaning them, because the oiler was too young and did not have any experience.

Mr. LISTER.—That is all.

[Proceedings Had Re Laches of Libelant, etc.]

Mr. BULL.—I suppose the defendants have abandoned part of their defence. In your opening statement you said you would prove laches on the part of the libelant.

Mr. ROSENHEIM.—The record is before the Court. The date of the accident and the date of the filing of the libel. I do not know that it is necessary to introduce them in evidence. They are records of the court. If it is necessary, they are offered.

The COURT.—The date of the filing of the libel and the date of the accident is before the Court. As Mr. Bull suggests, that does not have a tendency to prove laches. That is not the way you can prove laches. Mr. Hutton stated his principal defense was that there was no negligence on the part of the vessel. He also stated there was the ground for laches.

Mr. HUTTON.—We could prove that this vessel belonged to some one else at the time of the accident, but we have not got the records here.

Mr. ROSENHEIM.—We have a copy of the charter-party here, which is correct. It has been before the court in a suit in which it was sought to recover the merchandise or for labor performed.

(Testimony of Basilios Hanos.)

If there is no objection that can go in. We can produce in the morning the original charter-party.

The COURT.—I am ready to hear any further proof now. Mr. Bull made the suggestion, he asked if they had abandoned their defense of laches. I believe they say they have not. I incidentally stated they have not proved any laches. They have not attempted to prove any that I have heard.

Mr. HUTTON.—We are not compelled to put in proof, if we do not desire to. We simply let the matter stand.

Testimony closed.

Testimony of Basilios Hanos, for Libelant (Recalled).]

Monday, May 9th, 1910.

BASILIOS HANOS, the libelant recalled.

Mr. LISTER.—Q. What have you been able to do since this accident in the way of work?

A. I don't understand. Will the Consul explain?

Q. You can try. Have you been able to do work since you have been hurt?

A. I cannot understand.

Mr. LISTER.—They objected to the interpreter, if your Honor please.

Mr. ROSENHEIM.—Let the interpreter act.

(RICHARD DE FONTANA was sworn as interpreter.)

Mr. LISTER.—Q. Have you been able to do any work since this accident?

(Testimony of Basilios Hanos.)

A. No, sir; I never worked since.

Q. Is there any kind of work that you can do with your hands in this condition?

A. Don't you see what kind of work can I do?

Q. Do you know any trade or business that you could make a living at without the use of your hands?

A. He don't know anything else than being a fireman; he has never done anything.

The COURT.—Mr. Interpreter, you should give the answer in the words of the witness. Where he says "I" you should say "I." Do not say "he"; just translate his answer.

Mr. LISTER.—Q. Give that answer over again.

A. I have never done anything or know anything except being a fireman, and I don't know how to write or read either.

Q. In all your life have you been able to make a living in any way except by manual labor?

A. I have always been doing manual work.

Q. Do you know anything about trade, such as buying and selling small goods, or anything like that?

A. I don't know, because I am illiterate.

Q. Just try to move your hands, as hard as you can. Will they move any further back?

A. No, sir.

Mr. LISTER.—I think that is all we can show, that he is a manual laborer.

Cross-examination.

Mr. HUTTON.—Q. Have you tried to get work

(Deposition of J. Constantine.)

of any character since you were injured?

A. I never tried.

Q. Did you ever try to get a job as a watchman?

A. No, sir.

[Endorsed]: Filed Jun. 29, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

[Deposition of J. Constantine, for Libelant.]

In the United States District Court for the Northern District of California.

IN ADMIRALTY—No. ——.

BASILIOS HANOS,

Libelant,

vs.

S. S. "F. A. KILBURN,"

Defendant.

MARITIME INVESTMENT CO. (a Corporation),

Claimant.

Be it remembered that pursuant to the stipulation hereunto annexed, and on the 3d day of November, 1909, at the City and County of San Francisco, before me Samuel Rosenheim, a notary public in and for the City and County of San Francisco, State of California, personally appeared J. Constantine, witness produced on behalf of the libelant in the above-entitled action, now pending in the said Court, who, being by me duly sworn, was then and there examined and interrogated by Henry B. Lister, Esq., proctor for libelant, and cross-examined by myself, proctor for the claimant; it being stipulated by the

(Deposition of J. Constantine.)

parties in the above-entitled action that all objections to the questions including objections to form and every other objection may be raised at the time of the trial of this cause and that no objection is waived by a failure to note the same; the said J. Constantine thereupon testified as follows:

Direct Examination.

(By Mr. LISTER.)

1 Q. What is your name?

A. J. Constantine.

2 Q. What is your business?

A. I am an oiler now.

3 Q. What was your business about the 19th day of January, 1908?

A. At that time I was fireman and oiler, like.

4 Q. Were you fireman on the "F. A. Kilburn" on or about January 19th, 1908?

A. I was fireman about a month and then I get to be oiler.

5 Q. At the time of the accident what were you?

A. I was an oiler.

6 Q. Did the oiler on that vessel have anything to do with the boilers?

A. Well, I have seen them always doing something repairing the boilers.

7 Q. Do you mean that the oilers repair the boilers?

A. I don't mean that they were repairing the boilers. The oilers were cleaning the boilers.

8 Q. Do you mean that it was one of the duties of an oiler on this vessel, the "F. A. Kilburn" to

(Deposition of J. Constantine.)
clean the boilers?

A. Yes, sir. I was told to do it.

9 Q. Were you on the "Kilburn" on January 19th, 1908, at the time that Hanos was injured?

A. Yes, sir.

10 Q. Do you know how he came to be hurt?

A. It was on account of the explosion of steam. A tube exploded.

11 Q. Where was the tube that exploded?

A. It was in the boiler.

12 Q. In which boiler?

A. There were two boilers. It was in the after-boiler.

13 Q. How long before this accident did you clean this boiler?

A. I suppose it was about two days.

14 Q. At that time what was the condition of the tubes of this boiler in regard to cleanliness?

A. I know the tubes wasn't quite clean like. They was dirty.

15 Q. How did you clean them?

A. I cleaned them with a scraper. We had a bar, an extra pipe like, it wasn't a bar, and we put it through those tubes.

16 Q. Did you have a proper cleaner for the little tubes? A. No, sir.

17 Q. Was this tube which exploded a big tube or a small tube?

A. It was one of the smaller ones.

18 Q. What was the condition of the small tubes when you last cleaned them before this explosion?

(Deposition of J. Constantine.)

A. Some of the bars wouldn't go through,—the pipe like wouldn't go through some of them, and we had to hammer it through. I couldn't see inside of it like, would have to guess it.

19 Q. In cleaning these tubes what do you get out of them?

A. Some kind of hard stuff that I heard them call scale.

20 Q. How thick was the scale on these tubes?

A. That is hard to tell. It was not my place to examine that.

21 Q. Did you examine the broken tube after the boiler had cooled down?

A. Well, I didn't examine it, but I saw it. I had to take it and put it in the superintendent's cab. They told me and I took it myself and put it in his buggy. I took the two pieces of tube and put in the buggy.

22 Q. What did it look like?

A. It was split up.

23 Q. Was it thick or thin where it was split? Was it splintered?

A. I couldn't tell you that. I didn't examine it much.

Cross-examination.

(By Mr. ROSENHEIM.)

1 Q. You say you did not have a proper cleaner for cleaning these tubes? A. No, sir.

Q. What kind of a cleaner is usually used for that?

A. A kind of a small machine with three small

(Deposition of J. Constantine.)

legs, and at the end of each leg is three small cutters—what they call cutters.

3 Q. What was used on the "Kilburn" to clean the large tubes?

A. They used what they called a scraper on the large ones and for the small ones they used a bar.

4 Q. Before you worked on the "Kilburn" had you ever cleaned any tubular boilers? Not Scotch boilers, but tubular boilers?

A. I never saw tube water tube boilers before. That was the first time.

5 Q. When did you first clean any water tube boilers after you worked on the "Kilburn"?

A. About two months after.

6 Q. On what steamer did you work?

A. On the "Ascension," one of the Standard Oil Company's boats.

7 Q. How often did they clean the tube boilers on the "Ascension"?

A. The boilers would be cleaned about once every four weeks.

8 Q. What did they use on the "Ascension" for cleaning those boilers?

A. They used this kind of a machine with cutter.

9 Q. What do you mean by a brush, when you say that the big tubes on the "Kilburn" were cleaned with a brush? Can you describe the brush?

A. This was not a brush; it was a scraper. What they called a brush was for soot, and what they called a scraper was for scale.

10 Q. Then a scraper was what they used on the

(Deposition of J. Constantine.)

big tubes for scale?

A. Yes. But what they used on the smaller ones would just scratch off the small flakes or blisters like. You couldn't get out the heavy scale with it.

11 Q. Was the scraper used on the small tubes?

A. No, sir, not for the small tubes. We had a scraper but it wouldn't go through. You might get it halfway through one or two tubes. We never used it. We had to take this bar,—this pipe like for that job.

12 Q. Would the pipe go through the tubes?

A. On some of them we would have to hammer it, —couldn't get it through and would have to use the hammer, but in some of them it would get stuck and we couldn't get it through unless we did something worse, broke the tube, and you would have to take it back and leave it like that, blocked up.

13 Q. So there were some of the tubes that you couldn't get the pipe through?

A. Yes, sir. That's right.

14 Q. About how many tubes were there in the boiler of those boilers on the "Kilburn"?

A. I wouldn't be able to tell you.

15 Q. How many of the tubes were there that you couldn't get the pipe through?

A. I couldn't tell you. I wasn't the regular one for that. In the three rows from the bottom there were about two or three the bar couldn't go through. All the rest above three rows from the bottom I couldn't tell you about. I never touched them. We only put the hose with the fresh water through them.

(Deposition of J. Constantine.)

16 Q. Was it one of the bottom tubes that blew out?

A. I don't remember now what row the tube was in, whether it was the bottom, the next or the third.

17 Q. What was the color of the stuff that came out of the tubes when you cleaned them?

A. On the outside it was white, and on the inside it was a different color, like iron stuff.

18 Q. What did it look like that you say came out when you cleaned the boiler. Can you describe it?

A. I didn't take the whole business to look at. Some of it looked a different color.

19 Q. How thick was that stuff?

A. I didn't measure it.

20 Q. Without measuring it how thick would you say it was?

A. It would be a guess and be hard to say. About a sixteenth of an inch.

21 Q. That was the thickness of the stuff that you say came out of the tubes? A. Some of it.

22 Q. Was some of it of a different thickness?

A. Yes, sir. Thinner than that.

23 Q. How big were the pieces that came out?

A. Some of them came out about an inch and a half. Some of them were smaller than that.

24 Q. What did you do with this stuff that came out. Did you put it in a box or anything else?

A. Put it with the dirt and threw it away.

25 Q. How thick then would you say the scale was in the tubes?

A. It would be there one-sixteenth of an inch in

(Deposition of J. Constantine.)

the tubes.

26 Q. You are now speaking about the small tubes?

A. Yes, sir. The small tubes.

27 Q. How thick was it in the big tubes?

A. In the big tubes it was not so thick because the scraper did not give it a chance. I guess the scraper did not give it a chance to get that thick.

28 Q. How thick was the pipe that was run through the small tubes?

A. Well, the tubes were about two-inch tubes. I don't remember exactly the size, but about two-inch tubes and the pipe was smaller than that; just enough to go through the tubes.

29 Q. Was it a little smaller than the tubes or very much smaller than the tubes?

A. It was just like to go through. Just a little bit smaller to get it out.

30 Q. Did it fit tight in the tube? Close or loose?

A. Some of the tubes seemed to be clean and it went through, but when we go further then it goes tight.

31 Q. And then when it got in the tube and would be tight or wedged in there, you sometimes used the hammer to drive it through? Isn't that right?

A. That's right, sir.

32 Q. And then this stuff that you spoke about would come out, is that right?

A. Of course when the pipe goes through some of the stuff begins to drive out. We got to get the pipes clean. When we wash it out at the back this stuff

(Deposition of J. Constantine.)

comes out. We couldn't see the back side, because the pipe goes in from the front side.

33 Q. When you did that some of this stuff you have been talking about came out when you washed it out?

A. Yes, sir, it come out.

34 Q. You say the scale was about a sixteenth of an inch in thickness or less?

A. Yes, sir, something like that.

35 Q. What was the color of this scale you washed out?

A. On the outside it was white and on the inside it looks a different color altogether.

36 Q. What was the color of the stuff that came from the inside?

A. Not really black. Looked like iron stuff. A dark brown.

Redirect Examination.

(By Mr. LISTER.)

1 Q. When you were driving this pipe through and you met with an obstruction, how hard did you hit with the sledge hammer?

A. I hit it hard.

2 Q. Did you hit it as hard as you could with the hammer?

A. Yes, when I got a good chance and get good room.

3 Q. How heavy was that hammer? How many pounds?

A. It was what they called a floating hammer.

4 Q. Did you use your two hands to handle that

(Deposition of J. Constantine.)

hammer? A. Yes, sir.

5 Q. The hammer head was about how long and how thick?

A. About ten inches long and about four inches thick, round.

6 Q. And you struck the pipe that you drove through the tube with that hammer as hard as you could? A. Yes, sir.

G. CONSTANTINE.

State of California,
City and County of San Francisco,—ss.

I, Samuel Rosenheim, a Notary Public in and for the City and County of San Francisco, State of California, duly commissioned and qualified, do hereby certify that the witness, J. Constantine, appeared before me, and after being duly sworn his evidence was taken down and read over and corrected by him, after which he subscribed the same in my presence on the 3d day of November, 1909, at the office of Henry B. Lister, in the City and County of San Francisco, State of California.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[Seal] SAMUEL ROSENHEIM,
Notary Public in and for the City and County of San Francisco, State of California.

In the United States District Court for the Northern District of California.

IN ADMIRALTY—No.——

BASILIOS HANOS,

Libellant,

vs.

S. S. "F. A. KILBURN,"

Defendant.

MARITIME INVESTMENT CO. (a Corporation),

Claimant.

Stipulation.

It is hereby stipulated by and between the respective parties hereto that the deposition of J. Constantine, a witness produced on behalf of the libelant in the above-entitled action, may be taken before Samuel Rosenheim, Esq., a notary public in and for the City and County of San Francisco, State of California, and that the same may be used on the trial of this action.

It is further stipulated that all the objections to the questions and answers may be raised at the trial including objections as to the form of question. This stipulation is made to conform with the verbal stipulation made on the 30th day of October, 1909, and before the said deposition was taken, and it now ratifies and confirms said stipulation so made, and agrees

that the deposition so taken may be introduced in evidence on behalf of the libelant.

F. P. BULL,
HENRY B. LISTER,
Proctors for Libelant.
SAMUEL ROSENHEIM,
Proctor for Claimant.

[Endorsed]: Introduced in Evidence and Filed Dec. 22, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Deposition of John Malikis, for Libelant.]

In the United States District Court for the Northern District of California.

IN ADMIRALTY—No.——

BASILIOS HANOS,
Libellant,

vs.

S. S. "F. A. KILBURN,"
Defendant.

MARITIME INVESTMENT CO. (a Corporation),
Claimant.

Be it remembered: That pursuant to the stipulation hereunto annexed, and on the 30th day of October, 1909, at the City and County of San Francisco, before me, Samuel Rosenheim, a notary public in and for the City and County of San Francisco, State of California, personally appeared John Malikes, witness, produced on behalf of the libelant in the above-entitled action, now pending in the said court, who, being by me duly sworn, was then and there examined

(Deposition of John Malikis.)

and interrogated by Henry B. Lister Esq., proctor for libelant, and cross-examined by myself, proctor for the claimant; it being stipulated by the parties in the above-entitled action that all objections to the questions including objections to form and every other objection may be raised at the time of the trial of this cause and that no objection is waived by a failure to note the same; the said John Malikis thereupon testified as follows:

Direct Examination.

(By Mr. LISTER.)

Q. What is your name? A. John Malikis.

Q. What is your business? A. Fireman.

Q. Were you employed on the "F. A. Kilburn" Jan. 19, 1908? A. Yes, sir.

Q. Do you remember the plaintiff Hanos at that time? A. Yes.

Q. What do you know about the accident?

A. I was up on deck at the time of the explosion. I know I came down and found the man—he was scalded.

Q. Did you see the steam escaping from the boiler? A. Yes.

Q. What part of the boiler was the steam escaping from?

A. From the inside the fires.

Q. Did you examine the boiler as soon as you could get near it after the steam had escaped?

A. Yes, sir.

Q. What condition did you find the boiler in?

A. I found a bursted tube.

(Deposition of John Malikis.)

Q. What tube was it that burst?

A. A two-inch tube.

Q. Whereabouts in the boiler was this two-inch tube?

A. It was one of the small tubes.

Q. Was it a top or bottom tube?

A. A bottom small tube.

Q. Did you in the course of your employment clean the tubes of this boiler? A. Yes.

Q. Did you clean the tubes of the boiler alone, or did some one else assist you?

A. One fireman, one oiler and engineer all the time.

Q. How long before this accident occurred, or Jan. 19, 1908, did you clean this tube?

Objected to by Mr. Rosenheim—as being incompetent, irrelevant and immaterial.

A. We tried to clean it about 4 days before the explosion.

Q. Where did you try to clean it?

A. In Oakland Creek—at the drydock of Boole & Sons Shipyard, Cal.

Q. Do you understand the duties of a fireman of water tube boilers? A. Yes, sir.

Q. What are the duties of a fireman of water tube boiler? A. To keep steam up.

Q. What do you do in port?

A. Scale boilers, help, in engine-room.

Q. Did you ever scale this boiler?

Objected to by Mr. Rosenheim—as leading and suggestive, too indefinite as to time; also incompe-

(Deposition of John Malikis.)

tent, irrelevant and immaterial.

A. No; I sponge with the brush—can't scale a tube boiler with a hammer.

Q. How did you and the oiler and the engineer clean these tubes at the time you referred to?

Objected to by Mr. Rosenheim—as incompetent, immaterial and irrelevant.

A. First, I try with the brush and after try with the sledge bar and hit it with the big hammer.

Q. Why did you hit it with a hammer?

Objected to by Mr. Rosenheim—as leading and suggestive, incompetent, immaterial and irrelevant, particularly so, unless the tube which it is claimed burst, is the tube that counsel is questioning the witness about and the witness is asked to testify about.

A. Because the tubes were blocked up.

Q. What were they blocked up with?

By Mr. ROSENHEIM.—Same objection.

A. Blocked up by dirt; the bar could not get through inside.

Q. Do you remember if this particular tube that broke was one of those that was so blocked up that you could not get the bar through?

Objected to by Mr. Rosenheim—as leading and suggestive.

A. Do not remember, because they were all blocked up.

Cross-examination.

(By Mr. ROSENHEIM.)

Q. Do I understand you to say that all of the small tubes in that boiler were blocked?

(Deposition of John Malikis.)

A. Yes, because we were trying to clean them.

Q. How many small tubes were there in that boiler?

A. About three hundred; don't know exactly how many.

Q. And the whole three hundred were blocked up?

A. Some of them blocked, some I don't remember.

Q. How many of the three hundred were blocked up?

A. I don't remember because I don't know how many was blocked up.

Q. Did not you say a little while ago that all of the three hundred small tubes were blocked up?

A. Yes.

Q. Tell us now whether they were all blocked up, or whether they were not all blocked up?

A. All was dirty—brush can't go through all the tubes.

Q. Then, how many of the three hundred tubes couldn't you run a brush through?

A. Fifty could run brush through and two hundred and fifty could not run brush through.

Q. How many could you run a bar through and how many couldn't you run a bar through?

A. Don't remember.

(By Mr. LISTER.)

Q. Only a few that you couldn't get the bar through?

A. Plenty you couldn't get the bar through.

(Deposition of John Malikis.)

(By Mr. ROSENHEIM.)

Q. How many of the three hundred couldn't you get bar through?

A. I can't tell you; about 50 and not 250. The bar pass through all after hitting with the big hammer.

Q. When was the work of cleaning these tubes done before the time at Boole & Sons Shipyard?

A. Never clean all tubes before at one time.

Q. How many days before?

A. Two months before; a month or two before. Clean sixteen big ones and thirty-two small ones at time.

Q. What was the condition of the tubes the time before when you cleaned them?

A. The same as the last time.

Q. The time before that when you cleaned them what was the condition?

A. All the time bad; the same condition.

Q. How long were you working on that steamer?

A. About 9 months or 10 months or a year.

Q. And the tubes were always in the same condition up to that time.

A. Six or seven months before when run to Portland were better.

Q. Have you worked on other steamers with tube boilers? A. Yes.

Q. Did you clean tube boilers on other steamers?

A. Yes.

Q. Aren't all tube boilers cleaned on steamers from time to time in order to get out them any dirt

(Deposition of John Malikis.)

or rust? A. Yes.

Q. What steamer did you work on?

A. I worked on the ship "Minnesota."

Q. Had tube boilers? A. Yes.

Q. How long?

A. Three months and 18 days.

Q. Did you clean any boilers out on her?

A. Yes.

Q. How many times? A. Two times.

Q. Did you get dirt and rust out of these?

A. Yes.

Q. How did you get it out?

A. I was taking the tube out from the boiler and hitting the tube outside and all rust inside was out.

Q. That is to say it was knocked out with a hammer? A. Yes.

Q. Did you use any brush?

A. No, had different kinds of tools.

Q. Did you work as fireman on the "Kilburn" on the trip on which Mr. Hanos was hurt?

A. Yes.

Q. And you worked around these tubes?

A. Yes.

Q. You did not consider that it was dangerous for you to work around those tubes, before the accident?

A. Yes; I was thinking so—I was scared because it was rusty.

Q. Then why did you not quit your job and not make that trip?

A. Because I had no money and must make a couple trips to make some money.

(Deposition of John Malikis.)

Q. And you thought that you would take your life in your hands for the money you would make in these couple of trips? A. Yes.

Q. How much wages would you get on that couple of trips? A. $30.00.

Q. You were working with Mr. Hanos?

A. Yes.

Q. Before you made this trip did you talk this matter over with him about the tubes?

A. I don't talk to nobody.

Q. How is it that you did not talk to anybody?

A. Because I was fireman and engineer my boss.

Q. You didn't talk to your boss about it?

A. Because he was behind me all time I was at work.

Q. Where was Hanos when this work was being done? A. He was cleaning around the engine.

Q. You saw the work being done? A. Yes.

Q. How long were you doing this work cleaning out these boiler tubes? A. One day.

Q. What were the names of the men helping you clean them and what were their jobs?

A. George Considine, oiler—and engineer; that's all.

Q. What was Mr. Hanos' job there?

A. Fireman.

Q. Did he clean tubes too?

A. Sometimes—one time clean by one fireman and another time by another.

Q. Are you sure that Hanos did not do any cleaning over at Boole's Shipyard?

(Deposition of John Malikis.)

A. Yes—he was doing some of the cleaning of the tubes too.

Q. Some of the boiler tubes? A. Yes.

Q. You do not know that the tube which burst was one of the tubes that you cleaned, do you?

A. No.

By Mr. ROSENHEIM.—That is all.

Redirect Examination.

(By Mr. LISTER.)

Q. What kind of dirt was in the tube?

A. Salt and rust.

Q. What did it look like?

A. Rust—the dirt; yes.

Q. Was it hard or soft?

A. Some of them hard, some of it soft.

Q. Was the dirt in these tubes what is known as scales?

Objected to by Mr. Rosenheim as leading and suggestive.

Recross-examination.

(By Mr. ROSENHEIM.)

Q. What do you mean by scale?

A. Scale, I understand, engineer told me cleaning, taking the rust out.

Q. Do you know what scale is?

A. No, I don't know what scale is.

Q. When Mr. Lister asked you about scale you did not understand what he meant, did you?

A. No.

Q. Do you understand by scale, something that is done or that it is the name of something.

(Deposition of John Malikis.)

A. I don't know that kind of scale.

Q. Did you ever hear the word "scale" before you heard Mr. Lister use that word?

A. I don't understand what you mean.

Q. What did you say the engineer told you about scale?

A. The engineer told me about scale, any place he got the rust, take the rust out.

Q. What is rust got to do with scale?

A. Bust the iron.

Q. What burst the iron?

A. If you don't take rust out all the time, going at that place.

Q. Engineer told you that all rust should be taken out—is that it? A. Yes.

Q. You knew that before he told you, didn't you?

A. Yes, I knew.

Q. That's why you took the rust out of the tubes in the "Minnesota," was it? A. Yes.

Further Redirect.

(By Mr. LISTER.)

Q. What color is scale?

A. Scale look like red-brown.

Q. Did you ever see white scale?

A. Yes, that's salt.

Q. When you said that you did not know what scale was—did you mean that you did not know what it was made of?

A. Yes, I know—soon as water boils inside boiler make that white scale salt.

Q. Did it look the same as the crust which forms

(Deposition of John Malikis.)

inside a kitchen kettle? A. Don't understand.

Further Recross.

(By Mr. ROSENHEIM.)

Q. What is the difference between scale and rust?

A. There is no difference—the same thing.

By Mr. ROSENHEIM.—That is all.

JOHN MALIKIS.

City and County of San Francisco,—ss.
State of California,

I, Samuel Rosenheim, a notary public in and for the City and County of San Francisco, State of California, duly commissioned and qualified, do hereby certify that the witness John Malikis appeared before me, and after being duly sworn, his evidence was taken down and read over and corrected by him, after which he subscribed the same in my presence on the 30th day of October, 1909, at the office of Henry B. Lister, in the City and County of San Francisco, State of California.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

[Seal] SAMUEL ROSENHEIM,
Notary Public in and for the City and County of San Francisco, State of California.

In the United States District Court for the Northern District of California.

IN ADMIRALTY—No. ——.

BASILIOS HANOS,

Libelant,

vs.

S. S. "F. A. KILBURN,"

Defendant,

MARITIME INVESTMENT CO. (a Corporation),

Claimant.

Stipulation.

It is hereby stipulated by and between the respective parties hereto that the deposition of John Malikis, a witness produced on behalf of the libelant in the above-entitled action, may be taken before Samuel Rosenheim, Esq., a Notary Public, in and for the City and County of San Francisco, State of California, and that the same may be used on the trial of this action.

It is further stipulated that all the objections to the questions and answers may be raised at the trial including objections as to the form of question. This stipulation is made to conform with the verbal stipulation made on the 30th day of October, 1909, and before the said deposition was taken, and it now ratifies and confirms said stipulation so made, and

agrees that the deposition so taken may be introduced in evidence on behalf of the libelant.

F. P. BULL,
HENRY LISTER,
Proctors for Libelant.
S. ROSENHEIM,
Proctor for Claimant.

[Endorsed]: Introduced in Evidence and Filed Dec. 22, 1909. Jas. P. Brown, Clerk. By Francis Krull, D. C.

In the District Court of the United States, for the Northern District of California.

No. 14,059.

BASILIOS HANOS,

Libelant,

vs.

S. S. "F. A. KILBURN," a Steam Schooner,

Defendant,

THE MARITIME INVESTMENT COMPANY (a Corporation),

Claimant.

Memorandum Decision on Final Hearing.

This case has been submitted to me on the transcript of the testimony which was taken in open court before Judge De Haven, and depositions in behalf of the libelant have also been read.

At the hearing before me the libelant exhibited his hands and gave certain additional testimony regarding his inability to perform manual labor.

I have carefully considered the testimony and have also carefully examined the exhibits, which consists of certain pieces of boiler pipe.

It is not disputed but that one of the water tubes in the boilers of the respondent's steamer burst, and that as a result libelant was severely scalded in different parts of the body, particularly in the hands.

The main question in controversy is as to the cause of the explosion.

In my opinion the preponderance of evidence shows that the tubes which burst had become overheated through some obstruction contained therein whereby the circulation of the water was impeded, and that by reason of such overheating a portion of the tube burned away, reducing its thickness to such an extent that the bursting followed. This is shown, I think, not only by the testimony contained in libelant's deposition, but also by the testimony of Mr. Bulger, the Government Boiler Inspector, and by the obvious condition of the ruptured tube itself.

Mr. Bulger, who was called as a witness by respondent, stated that the tube shows for itself that it has been overheated. He gives it as his opinion that the bursting was caused by some latent defect, probably in the lamination, but he does not support this opinion by any convincing reason. His opinion that a latent defect in the tube caused the overheating does not appear to me to be well founded, and his adherence to that opinion on cross-examination is not well sustained.

The weight of the evidence, in my judgment, shows that a deposit of scale, or some similar sub-

stance, existed in this particular tube, and that this deposit caused the overheating and the consequent bursting. Such a deposit, under the evidence, would not have been in the tube if the officers of respondents had exercised ordinary care. The steamer was laid up at a shipyard in San Francisco only a few days before the accident, and at that time certain work was done in the way of inspecting and cleaning the boiler tubes.

I consider it established by the evidence that respondent's officers were negligent, either in failing to make such inspection as would disclose the existence of the deposit, or in failing to take proper steps to remove it if discovered.

Respondent's testimony is to the effect that the scraper used on this occasion was not intended to remove scale, but only soft mud which (it is claimed) generally accumulates in such boilers in this locality, and that it was not necessary to use any instrument capable of removing scale, because no scale existed, except to a very slight extent which would be beneficial rather than injurious. However, this may be, I think the evidence shows that a deposit of some kind existed which led to the overheating and bursting, and I find nothing in the evidence which would warrant me in holding that such a deposit can exist, causing a dangerous explosion and serious injury to employees, without negligence on the part of those in charge of the steamer.

I conclude, therefore, that the evidence shows that libelant is entitled to recover.

The answer sets up a defense of laches, but such

defense was not referred to by claimant's counsel in his argument, and I find no evidence tending to support it.

The evidence relating to the extent of libelant's injuries is not altogether satisfactory. Dr. Logan, the only physician or surgeon who testified, states that by a plastic operation the condition of libelant's hands can be improved. In his opinion certain of the digits can be relieved, but one or two cannot be. He says that libelant can never us his hands to the same extent as before the injury, but that it is possible that he can do such manual labor as a fireman is required to do on a steamship. The anterior surface of libelant's hands are in perfect condition, but by reason of contraction of the posterior portions, his hands are now of little use.

Taking the surgeon's testimony altogether I cannot consider this a case of disability of the hands. So far as future damages are concerned, only such as are reasonably certain to follow, as the inevitable result of the injury, can be allowed. *Respondents* age is not shown by the record, but he appears to be about 30 years old.

The cost of the operation, required to properly treat the hands, is not shown beyond the fact that it would take 2 or 3 months.

Taking libelant's monthly earnings, prior to the injury, including board, at $85 per month, he has lost, up to the present time, approximately $2,380. He states that he expended $1,000 for expenses, but no satisfactory statement of the items is given, and as part of the expenses was board, which is included

in the figures given above, I allow $500 for this item. I also allow $500 for pain and suffering, and I estimate the cost of an operation, including the loss of time involved therein, at $800. I allow approximately $2,000 for permanent impairment of earning capacity, and I make a total award in favor of libelant of $6,200.00.

In cases of personal injuries I do not undertake, any more than a jury undertakes, to arrive at an exact mathematical basis of providing compensation. It is impossible to adopt any positive and precise method. I mention the items and figures above stated merely as showing in a very general way how I have arrived at the amount.

May 10, 1910.

GEORGE DONWORTH,
District Judge.

[Endorsed]: Filed May 10th, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

[Decree.]

UNITED STATES OF AMERICA

In the District Court of the United States, in and for the Northern District of California.

At a stated term of the District Court of the United States, for the Northern District of California, held in the City and County of San Francisco, on Monday, May 9th, A. D. 1910. Present: Hon. GEORGE DONWORTH, District Judge.

IN ADMIRALTY—No. 14,059.

BASILIOS HANOS,

Libellant,

vs.

S. S. "F. A. KILBURN," a Steam Schooner,

Defendant,

THE MARITIME INVESTMENT COMPANY (a Corporation),

Claimant.

The above-entitled cause having come on regularly for hearing, and having been fully heard upon the pleading and proofs and the arguments of the proctors for the respective parties, and due deliberation being had on motion of Franklin P. Bull and Henry B. Lister, proctors for libelant;

It is ordered, adjudged and decreed that the libelant do have and recover in this action against the American steamer "F. A. Kilburn," the sum of Sixty-two Hundred ($6200.00) Dollars, with interest on said sum at the rate of six (6) per cent per annum

from the making and filing of this decree and until paid, together with libelant's costs to be taxed.

And on like motion it is further ordered, adjudged and decreed that unless an appeal be taken from this decree within the time limited by law and the rules and practice of this Court (after due notice of the filing of this decree to the proctors for claimant), the Maritime Investment Company and Carl G. Brown, the stipulators for costs and values herein on the part of the claimant of said American steamer "F. A. Kilburn," cause the engagements of their said stipulations to be performed, or show cause within four days after the expiration of said time to appeal, or on the 1st day of jurisdiction thereafter, why execution should *job* issue against their chattels and lands according to their stipulations.

Ten days' stay of process on this decree granted.

Done this 10th day of May, A. D. 1910.

GEORGE DONWORTH,
Judge.

[Endorsed]: Filed May 10, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

[Notice of Appeal.]

In the District Court of the United States in and for the Northern District of California.

IN ADMIRALTY.

BASILIOS HANOS,

Libellant,

vs.

S. S. "F. A. KILBURN," a Steam Schooner,

Defendant,

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant.

The libellant above named and his proctors will please take notice that the claimant in said cause hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree given and made by the above-named District Court on the tenth day of May, 1910, awarding damages to the libellant with costs, and from each part of said decree and the whole thereof.

Dated May 18th, 1910.

SAMUEL ROSENHEIM,
H. W. HUTTON,
BERNARD SILVERSTEIN,
Proctors for Claimant and Appellant.

Received copy of the within Notice of Appeal this

18th day of May, 1910, reserving all rights and objections.

(Signed) FRANKLIN P. BULL,
HENRY B. LISTER,
Proctors for Libellant.

Filed May 19, 1910. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

BASILIOS HANOS,

Libellant,

vs.

S. S. "F. A. KILBURN," a Steam Schooner,

Defendant,

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant.

Assignment of Errors.

The claimant and appellant in the above-entitled cause and proceeding specifies the following as the errors committed by the District Court of the United States, in and for the Northern District of California, in its decision and decree in said cause, and also in the proceedings therein.

1. The said Court erred in overruling each of the exceptions filed by the said claimant and appellant to libellant's libel in said cause and proceedings;

2. The Court erred in finding and deciding that the preponderance of or any evidence in said cause

showed that the boiler tube that burst and in question in this case had or was overheated through some or any obstruction contained therein whereby the circulation of the water in the said tube was impeded;

3. The Court erred in finding and deciding that by reason of such or any overheating of the said boiler tube a portion of the said tube burned away, reducing its thickness to such an extent that the bursting followed;

4. The said Court erred in finding and deciding that the testimony contained in libellant's depositions and the testimony of Mr. Bulger and the obvious or any condition of the bursted tube itself or any testimony in the said cause, or the condition of the said tube itself, showed that it had become overheated through some obstruction contained therein, whereby the circulation of the water was impeded, or that it became overheated by any cause, or that by reason of such or any overheating a portion of the said tube burned away, or that by reason of any of said causes the thickness of said boiler tube was reduced to such an extent, or to any extent, and bursting followed;

5. The said Court erred in finding and deciding that the bursted boiler tube in this case showed for itself that it had been overheated, and that Mr. Bulger so stated;

6. The Court erred in finding and deciding that Mr. Bulger did not support his opinion by convincing reason that the bursting of the boiler tube in this cause was caused by some latent defect, probably lamination;

7. The said Court erred in finding and deciding

that the opinion of Mr. Bulger that a latent defect in the said tube caused the overheating was not well founded, and that the adherence of Mr. Bulger to that opinion on cross-examination was not well sustained;

8. The said Court erred in finding and deciding that the weight of the evidence or any evidence in said cause showed that a deposit of scale or some or any similar substance existed in that particular tube, and that that deposit caused the overheating and the consequent bursting;

9. That said Court erred in finding and deciding that the officers of the claimant had not exercised ordinary care;

10. The Court erred in finding and deciding that it was established by the evidence that the officers of the respondent or anyone else were negligent in any degree, or in any particular, or in failing to make such inspection as would disclose the existence of a deposit or the deposit, or in failing to take proper steps to remove it if discovered;

11. The Court erred in finding and deciding that respondent's (claimant's) testimony was to the effect that the scraper used on the "F. A. Kilburn" was not intended to remove scale;

12. The Court erred in finding and deciding that the scraper used on the "F. A. Kilburn" was only intended to remove soft mud;

13. The Court erred in finding and deciding that the or any of the evidence in this cause showed that a deposit of some or any kind existed which led to the overheating and bursting of the tube;

14. The Court erred in finding in favor of the libelant, and also erred in not dismissing libellant's libel;

15. The Court erred in not finding and deciding that the bursting of the boiler tube in question in this case was caused by a latent, undiscoverable defect in the tube itself;

16. The Court erred in not finding and deciding that the claimant herein and those operating the steamer "F. A. Kilburn" at the time of the receipt of the injuries by the libellant had used due care in the cleaning of her boiler tubes and in the inspection thereof;

17. The Court erred in not finding and deciding that the injuries received by the libellant were received by him through the ordinary risk of the business in which he was engaged;

18. The Court erred in not finding and deciding that the injuries received by libellant were caused by the negligence, if any, of a fellow-servant of the said libellant himself;

19. The Court erred in awarding to the libellant $2,380.00, or any sum for alleged losses up to the time of the trial of this cause, as the testimony shows that if the libellant had used ordinary care and been properly attended at the time of the receipt of his injuries, that amount would not have been lost to him;

20. The Court erred in awarding to the libellant the sum of $500.00 for expenses, or any sum in excess of ninety-four ($94.00) dollars, as the proof shows that is all the money he expended;

21. The Court erred in awarding the sum of $500.00, or any sum to the libellant for pain and suffering;

22. The Court erred in awarding to the libellant the sum of $800.00, or any other sum, for the costs of an operation on libellant's hands, for the reason there is no proof the libellant intends to have his hands operated upon, nor is there any proof that that would be the cost thereof, nor is there any proof as to what would be the cost of such an operation or what time would be lost by libellant in undergoing such operation;

23. The Court erred in awarding any damages or expenses to the libellant in this cause;

24. The Court erred in not finding and deciding that if libellant was entitled to any damages at all, that he was entitled to but the sum of $2,000.00, the amount the Court found libellant was entitled to recover for permanent impairment of earning capacity;

25. The Court erred in not giving due consideration to the testimony of John T. Flinn, E. S. Hough, Charles Grundell, Charles H. Bates, and Albert Flinn;

In order that the foregoing assignment of error may be and appear of record, claimant and appellant herein file and present *that* same to the Court, and pray that such disposition be made thereof as in accordance with the law in such cases made and provided, and said claimant and appellant prays a reversal of the decree made and entered herein, and

for judgment that the Libel of the libellant may be dismissed.

Dated San Francisco, May 18, 1910.

SAMUEL ROSENHEIM,
H. W. HUTTON,
B. SILVERSTEIN,
Proctors for Claimant and Appellant.

Copy received this 27th day of May, 1910.

F. P. BULL,
HENRY B. LISTER,
Proctors for Libellant.

[Endorsed]: Filed May 28, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, for the Northern District of California.

BASILIOS HANOS,

Libelant,

vs.

S. S. "F. A. KILBURN," a Steam Schooner,

Respondent.

MARITIME INVESTMENT COMPANY (a Corporation),

Claimant.

Stipulation and Order Directing Transmission of Original Exhibits.

It is hereby stipulated, by the parties hereto, that in addition to the transcript of the record on appeal in this action, that the clerk of this Court transmit to the Clerk of the United States Circuit Court of

Appeal, Ninth Judicial Circuit, at San Francisco, all of the original exhibits in this action.

HENRY B. LISTER and
FRANKLIN P. BULL,
Proctors for Libelant.
SAMUEL ROSENHEIM and
BERNARD SILVERSTEIN,
Proctors for Respondent.

Upon motion of proctors for respondent herein, and pursuant to the foregoing stipulation,

IT IS ORDERED that in addition to the transcript of the record on appeal in this action, that the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals, Ninth Judicial Circuit, at San Francisco, all of the original exhibits in this action, which said original exhibits are to be kept by said Clerk and returned to this court upon the final determination of this cause in said Court of Appeals.

Dated August 18th, 1910.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Aug. 18, 1910. Jas. B. Brown, Clerk.

Certificate of Clerk U. S. District Court to Apostles.

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify that the

foregoing and hereunto annexed one hundred and forty-nine pages, numbered from 1 to 149, inclusive, with the accompanying exhibits, 10 in number, contain a full and true Transcript of the records in the said District Court, made up pursuant to Subdivision 1 of Rule 4 in Admiralty, of the United States Circuit Court of Appeals, for the Ninth Circuit, and the instructions of Samuel Rosenheim, H. W. Hutton and Bernard Silverstein, proctors for claimant and appellant, in the cause entitled Basilios Hanos, Libelant, vs. The S. S. "F. A. Kilburn," a Steam Schooner, etc., Respondent, The Maritime Investment Company, a Corporation, Claimant, No. 14,059.

I further certify that the costs of preparing and certifying to the foregoing Transcript of Appeal is the sum of Eighty-three and 60/100 Dollars ($83.-60), and that the same has been paid to me by proctors for claimant and appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 20th day of August, 1910, and of the Independence of the United States the one hundred and thirty-fifth.

[Seal] JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1894. United States Circuit Court of Appeals for the Ninth Circuit. The Maritime Investment Company (a Corporation), Claimant of the S. S. "F. A. Kilburn," a Steam Schooner, Appellant, vs. Basilios Hanos, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California.

Filed August 20, 1910.

F. D. MONCKTON,
Clerk.

Certificate of Clerk District Court as to Exhibits.

United States of America,
Northern District of California,—ss.

I, Jas. P. Brown, Clerk of the District Court of the United States in and for the Northern District of California, do hereby certify that the annexed documents, four in number, and nine pieces of boiler tubes, transmitted under separate cover, are the original exhibits, introduced and filed in the case of Basilios Hanos, Libelant, vs. The S. S. "F. A. Kilburn," a Steam Schooner, Defendant, and Maritime Investment Company, a Corporation, Claimant, No. 14,059, and are herewith transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, as per stipulation and order filed in this court and embodied in the Transcript of Appeal, herewith, and which said exhibits are known as and marked:

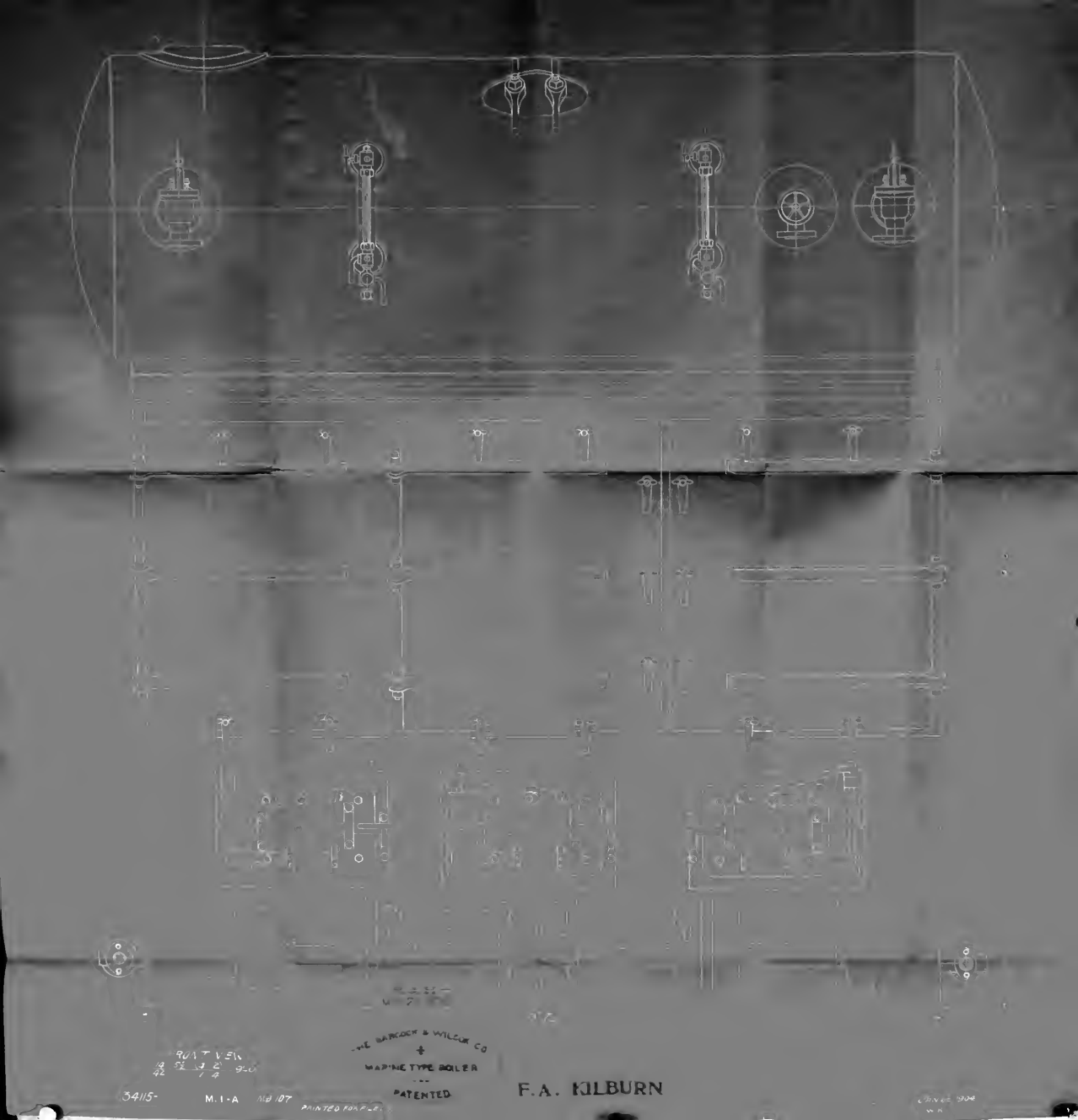
Libelant's Exhibit No. 1 (Blue-prints, Boilers, 10 in number);

Claimant's Exhibits Nos. 1, 2, and 3 (Certificates of Inspection);

Claimant's Exhibits Nos. 4, 5, 6, 7, 8, and 9 (Pieces of Boiler Tubes).

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 20th day of August, A. D. 1910.

[Seal] JAS. P. BROWN,
Clerk.

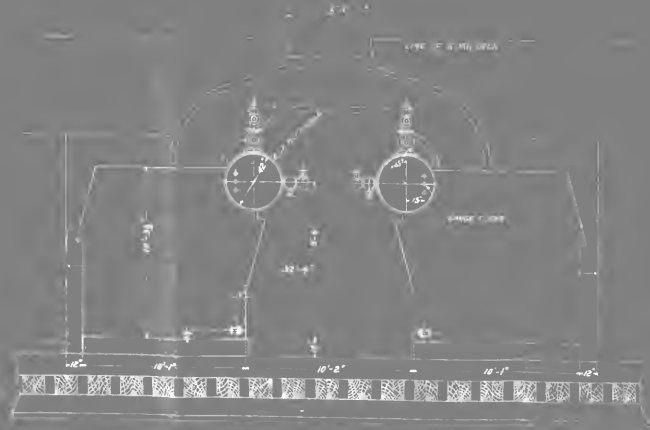


THE BABCOCK & WILCOX CO
MARINE TYPE BOILER
PATENTED

F. A. KILBURN

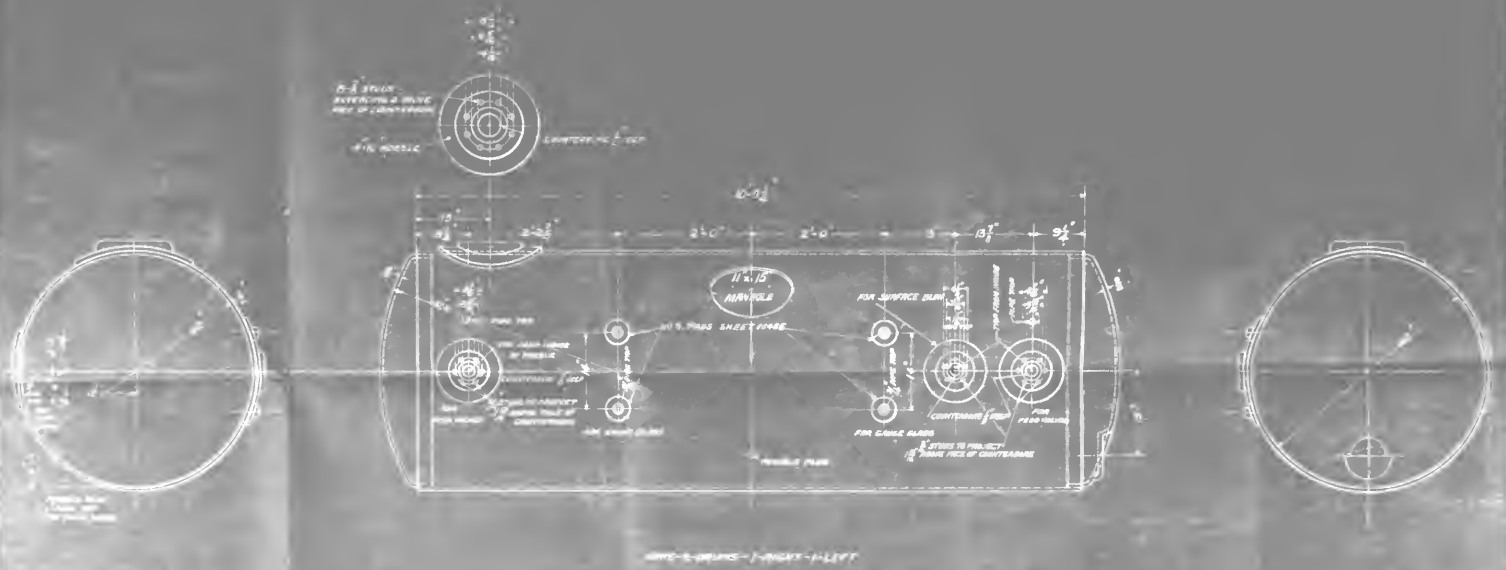
34115- M.1-A No 107 PRINTED FOR F.C.


LONGITUDINAL SECTION
THE BABCOCK & WILCOX CO.
&
MARINE TYPE BOILER
PATENTED
F. A. KILBURN



MARINE BOILERS.
GENERAL ARRANGEMENT
SCALE 1/2 & 1"=1'-0"
DRAWN
CHECKED
3856-2 M.S. 12-27-27

THE BABCOCK & WILCOX CO.
NEW YORK
ENGINEERING DEPT.
SCALE 1/2" = 1'-0" APR. 10 1943

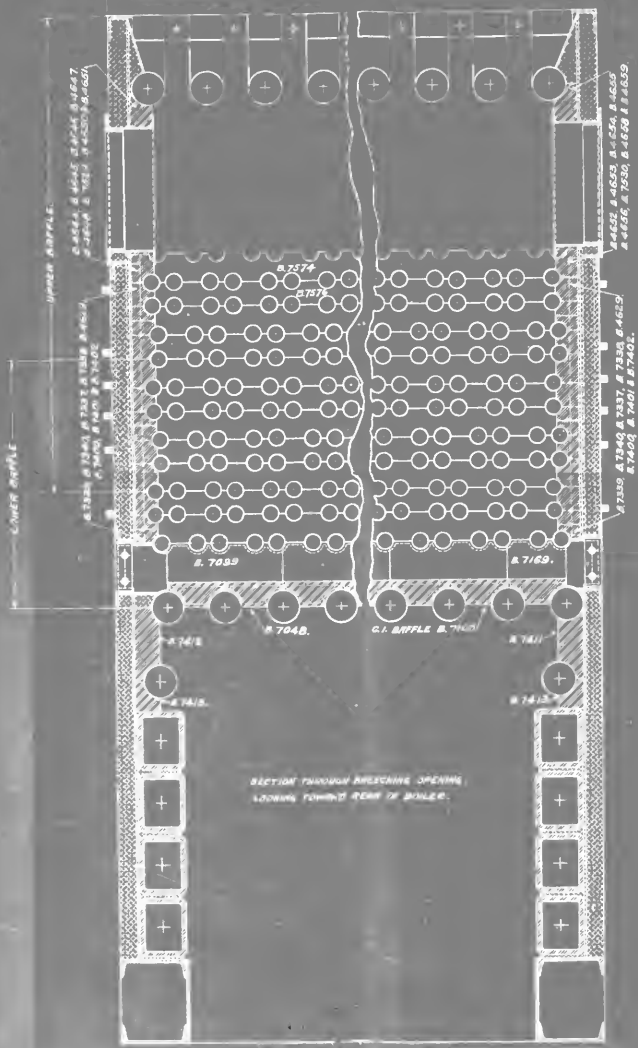


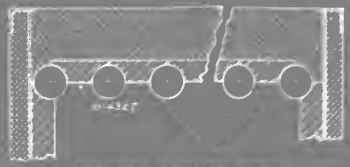
S. J. H.
MAY 25. 1906

THE BABCOCK & WILCOX CO.
MARINE TYPE BOILER
PATENTED.

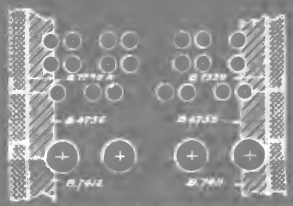
F. A. KILBURN

THE BABCOCK & WILCOX CO.
NEW YORK
ENGINEERING DEPARTMENT





SECTION BACK OF ARCHING OPENING



SECTION BACK OF CLEANING DOOR

CLEANING PLATE ½ THICK ONE PER BOILER

CLEANING PLATE ½ THICK ONE PER BOILER

BILL OF MATERIAL
REQUIRED FOR ONE BOILER
FINISHED SIZES

16	FLAME PLATES	B. 7314
14	"	B. 7315
78	FIRE BRICKS	B. 4317
6	" "	B. 7339
6	" "	B. 7340
12	" "	B. 7337
12	" "	B. 7338
6	" "	B. 4629
6	" "	B. 7400
6	" "	B. 7401
12	" "	B. 7402
4	" "	B. 4735
3	" "	B. 4736
3	" "	B. 7411
9	" "	B. 7412
10	" "	B. 7413
20	" "	B. 7048
1 EACH	" "	B. 4644 TO 4648
1	" "	B. 4635
1	" "	B. 7039
1	" "	B. 4650
1	" "	B. 7407
1 EACH	" "	B. 4652 TO 4656
1	" "	B. 4653
1	" "	B. 7030
1	" "	B. 4658
1	" "	B. 4659
18	" "	B. 7038
20	ORDINARY FIRE BRICK	
7	BAFFLE BLOCKS	B. 7339
14	" "	B. 7100
22	CU. FT. LOOSE MAGNESIA	
40	₰ MAGNESITE 2" THICK	
40	₰ ASBESTOS 2" "	
1	BAFFLE BLOCK	B. 7149

THE BABCOCK & WILCOX CO.
MARINE TYPE BOILER
PATENTED.

F. A. KILBURN

MARINE BOILERS.
ARRANGEMENT OF
FLAMES AND BRICKS.

THE BABCOCK & WILCOX CO.
NEW YORK.
ENGINEERING DEPARTMENT.
SCALE


B. 7213
B. 7562
B. 7232
BILL OF MATERIAL
FOR ONE BOILER
FINISHED SIZES
PLATES THICK
COVER PLATES
PLATES
BARS
CHANNELS
FURNACE DOOR FRAME B. 7562
B. 7232
B. 7233
LINTELS B. 7562
HEAD PLATES B. 7232
ASH DOOR MANHOLES, SHEET B. 5004
WROT. STEEL LATCHES NO. 8 SH. 933
HINGE LINES
MAY 25 1906
THE BABCOCK & WILCOX CO.
MARINE TYPE BOILER
PATENTED.
F. A. KILBURN
THE BABCOCK & WILCOX CO.
NEW YORK.

—COMPLETE SECTIONS PER BOILER

BILL OF MATERIAL
REQUIRED FOR ONE SECTION
FINISHED SIZES

22	2" TUBES No 10 B.W.G. SEAMLESS STEEL	9'-2" LONG.
1	4" " 4 " "	9'-5" "
1	4" " 4 " "	7'-3½" "
1	4" NIPPLE 4 " "	10½" "
1	4" " 4 " "	3" "
1	FORGED STEEL HEADER No 11	7" HIGH
1	" " " " 11 "	"
24	MALL. STEEL H.H. FITTINGS	2" PLATE & BRIDGE

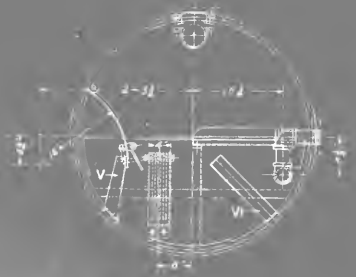
MARINE BOILERS,
CENTER SECTION

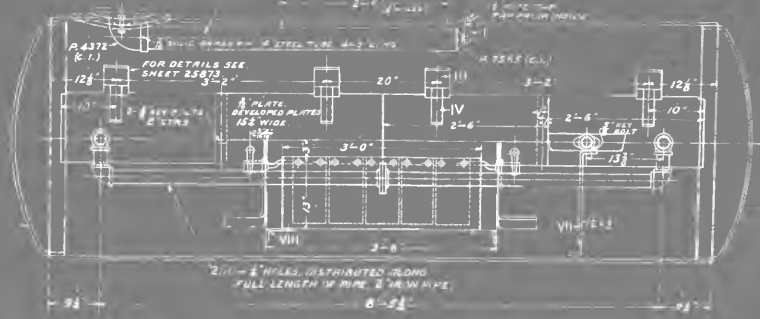
SHT.	CASE.	JOB.
287-1	M. 38	W.B.&W.

THE BABCOCK & WILCOX CO.
&
MARINE TYPE BOILER
PATENTED.

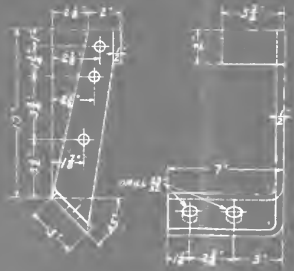
F. A. KILBURN

THE BABCOCK & WILCOX CO.
NEW YORK.
ENGINEERING DEPARTMENT.
SCALE 1"=1'-0" June 25 1902.





—2— PER BOILER
SCALE, 3"=1 FT.



—2— PER BOILER
—1— R. —1— L.
SCALE, 3"=1 FT.

NOTE,
ZINC PLATE BASKET OF #10 B.W.G. PLATE, PERFORATED ON SIDES, ENDS AND BOTTOM BY ½" HOLES ON 1½" CTRS. MAKE BASKET IN TWO PARTS TO GO IN MANHOLE.
ZINC PLATES ARRANGED IN 3 GROUPS OF 3 PLATES EACH.

ALL NUTS, EXCEPT NUTS ON KEY BOLTS TO BE GUNMO.
ALL HOLES NOT OTHERWISE MARKED ARE FOR ¾" KEY BOLTS.

—|— DRUM ARRANGED THUS.
—|— " " TO OTHER HAND

—2— PER BOILER
R & L. IN REGARD TO LAP

BILL OF MATERIAL FOR ONE BOILER.		
1	4" STEEL TUBE, 4'-9" LONG	
1	DRY PIPE ELBOW, P.4372 (C.I.)	
1	" " ICAD, P.7565 (C.I.)	
1	BAR ⅝" x 6" LONG	I
1	EYE BOLT	II
4	PLATES 25" x 9" x ¼"	III
4	" 2" x 11" x ¼"	IV
4	" 30" x 15¾" x ¼" (BAFFLE PLATES)	
2	" 21" x 20" x ¼"	V
2	" 28" x 23" x ¼"	VI
1	" 220" x 8" x ¼"	VII
2	" 27" x 5" x ¼"	VIII
2	" 40" x 10" x ¼"	IX
2	" 15" x 10" x ¼"	X
2	" 20" x 20" x ¼" (FRONT ZINC PL. BASKET)	

BILL OF MATERIAL (CONTINUED)		
18	ZINC PLATES, 6" x 12" x ⅛"	
1	¾" IRON PIPE, [redacted] 8" LONG.	
1	2" " " 1'-0" "	
4	2" ELBOWS, C.I.	
1	2" FLANGE UNION C.I. (PLAIN)	
[redacted]		
2	TUBE DOOR LATCHES COMPLETE, SK 953	
1	W.S. SCUM PAN, SHEET 21722	
1	BAR ¾" DIA. 2'-6" LONG	

BOLTS NOT INCLUDED IN ABOVE LIST

F.A. KILBURN

THE BABCOCK & WILCOX CO.
NEW YORK
ENGINEERING DEPARTMENT.

MARINE BOILERS,
BACK PLATE
MADE
SHEET.
32926-
CLASS
M.B.
JOB.
M.B.107
MARINE TYPE BOILER
PATENTED
F.A. KILBURN
THE BABCOCK & WILCOX CO.
NEW YORK
ENGINEERING DEPARTMENT
SCALE
SEPT. 26. 03

BILL OF MATERIAL REQUIRED FOR ONE BOILER FINISHED SIZES		
33	2"	TUBES No 11 B.W.G SEAMLESS STEEL - 9'-2 LONG
2	4"	TUBES No 6 " " " 8'-11¼" "
2	4"	" No 6 " " " 7'-3½" "
2	4"	NIPPLES No 6 " " " 10" "
16	4"	" No 6 " " " 4" "
6	4"	" No 6 " " " 3" "
2	4½"	PIPES EX HEAVY " " 5" "
1		FRONT HEADERS No 11 7 NGH. FORGED STEEL
1		REAR " No 11 8 " " "
1		FRONT CORNER BOXES
2		REAR " "
6		SIDE BOXES " PLATES 24"-2½ THICK
30		HAND HOLE FITTINGS 2"-8 PITCH 4" CENTRES
1		PLUGS PATTERN No 4" CAPPED
2		4" TUBES No 6 B.W.G SEAMLESS STEEL 3'-6 LONG

No. 1894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In Admiralty.

THE MARITIME INVESTMENT COMPANY (a corporation), claimant of the S. S. "F. A. KILBURN", a steam schooner,
Appellant,

vs.

BASILIOS HANOS,
Appellee.

BRIEF FOR APPELLANT.

SAMUEL ROSENHEIM,
H. W. HUTTON,
BERNARD SILVERSTEIN,
Proctors for Appellants.

Filed this.....day of October, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 1894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

In Admiralty.

THE MARITIME INVESTMENT COMPANY (a corporation), claimant of the S. S. "F. A. KILBURN", a steam schooner,
Appellant,

vs.

BASILIOS HANOS,
Appellee.

BRIEF FOR APPELLANT.

The consideration of the Court is invited upon this appeal to the following important questions:

a. Can a vessel be libeled in an admiralty court after the time limited by the statutes of the state in which the vessel is owned, without some showing of good reasons for the delay?

b. Is the bare allegation that machinery is defective and unsafe, sufficient in an action for dam-

ages in a court of admiralty without a specification of the particulars in which it is unsafe and defective?

c. When an employer has shown by uncontradicted evidence that he has had machinery periodically and properly inspected, can he be held responsible for damages to an employee for injuries occurring by reason of the fracture of part of such machinery, when there is uncontradicted proof that the injuries were caused by a latent defect in the machinery?

d. Can an employer be held responsible for injuries to an employee when there is no proof of negligence?

e. What is the true measure of damages in a case such as this?

Statement of Facts.

The evidence in this case was all taken in open court before his honor Judge De Haven and the case argued and submitted to him for decision, but was re-argued before and decided by his honor Judge Donworth on one of the times that he sat in the United States District Court for the Northern District of California.

The proof shows that libellant was employed as a fireman on the vessel "F. A. Kilburn", a steam schooner built in 1904 (page 45 of transcript shows vessel to be "sixteen" years old by a typographical error; it should read "six"), at which time two boil-

ers of a type known as "Babcock & Wilcox" boilers were installed. These boilers each contained 352 tubes two inches in diameter and 16 tubes four inches in diameter (pages 61 and 62 of transcript, and blue print, page 183 of transcript). The tubes were nine feet long inside of the boiler heads (blue print, page 180 of transcript). The vessel was inspected by the United States boiler inspectors in May of each year, being inspected on the May previous to the happening of the accident to Hanos, at Portland, Oregon, at which time the boilers were subjected to a hydrostatic pressure of double the amount the vessel was allowed to carry and had at the time of the accident.

The boiler tubes were cleaned in this vessel every 12 days, at the time of the accident—there had been a time when they were cleaned every three weeks—at which times the tubes were thoroughly inspected. Once a month is considered proper inspection (page 108). Two days previous to the accident the vessel had been on marine ways at Oakland, Cal., and the tubes in the boiler in which the tube that scalded the libellant was contained were thoroughly *cleaned* and *inspected* (pages 46, 47, 61, 118, 119, 122, 123, 125, 126, 127, 129, 130), five men being engaged on the work. May 19, 1908, just four months after this accident, the boilers were inspected and the report of the United States inspector reads as follows (page 89 of transcript): "These boilers *are clean* " and show good care; the main plant is generally " well kept up".

On May 11, 1909, 6 four-inch tubes in the other boiler were renewed (page 89 of transcript). The evidence further shows that Mr. Grundell, employed by the "Babcock and Wilcox" people, visited the vessel about three months before the accident, saw them cleaning tubes, and found the boilers perfectly clean. Two days after the boiler was so cleaned at Boole's shipyard, and while on the high seas, one of the tubes in the third row from the bottom of the two-inch tubes exploded and the libellant, being in the fire room, the backs of his hands were scalded. The same night one other also exploded; but before that time, and afterwards, up to the time of the trial, no others out of 704 tubes, that being the total in both the boilers, has caused any trouble.

John T. Flinn, the chief engineer of the vessel, testified that the explosion was caused by a latent defect (pages 49, 54).

John K. Bulger, United States inspector of boilers, who held an investigation on this accident, testified that it was caused by a latent defect in the tube *not possible to discover* (pages 75, 80).

Edwin S. Hough (pages 98, 99) testified likewise.

The evidence is all to the effect that there was no scale in the boilers.

It was further shown that the libellant's hands could have been so improved by proper treatment that he would partially recover the use of them (pages 27-28-29 of transcript).

Argument.

I.

THIS CAUSE WAS BARRED BY LACHES.

The accident to the libellant occurred January 19 1908; the libel was filed July 31, 1909 (pages 14 and 15 of transcript), one year, seven months and twelve days after the accident. Under the statutes of the state of California, to which state this vessel belonged, the action either in personam or rem was barred in one year.

> Section 813, Code Civil Procedure, relating to liens on vessel, and subdivision 3 of section 340, same code, relating to actions in personam for injuries to the person.

It is true that Courts of admiralty, as equity Courts, do not always apply the statute of limitations to actions pending in such Courts, but the law of such Courts is expressed in the following language:

> "And most especially, the analogies of the local laws of limitations are fully to be considered and carefully weighed."
>
> Benedict's Admiralty, Sec. 605.

The decisions of admiralty Courts on this subject are unanimously to the following effect:

a. If a cause is commenced within the period of the statute of limitations, and the opposing party pleads laches, he must show special reasons for the application of a shorter period than that prescribed by the statute, in order to make his plea of laches good.

b. If, as in this case, the action is not commenced until after the period prescribed by the statute has run, the party commencing it must show special reasons why the statute should not apply.

No excuse was offered in this case why it was not commenced within one year.

The statute of limitations is a good defense in admiralty unless special reasons are shown why it should not apply.

> Scull v. Raymond, 18 Fed. Rep. 547a, 553;
> Southard v. Brady, 36 Id. 560;
> The Southbank, 128 Id. 149.

In the case of Pacific Coast S. S. Co. v. Bancroft 94 Fed. Rep. 190, decided by this Court, the action was commenced on the last day within the period of time prescribed by the statute of limitations of this state, and this Court in a well considered opinion found no fault with the action not having been brought earlier. See page 189.

It is in evidence in this case that this vessel was within the waters of the state of California the whole of the time between the happening of the accident and the filing of the libel. And a ship owner is entitled to the benefit of the statute unless some good reason is shown for the action not having been earlier commenced.

Lapse of time makes a defense more difficult; a party never at any time files a libel or complaint until he is ready, and the purpose of the statute is to

compel diligence and not to allow a party who thinks he has a good cause of action to sleep on his supposed rights, and thus take an unfair advantage of the other party to the action or proceeding.

The claimant pleaded the statute in its exceptions (pages 16 and 17 of transcript), and in its answer (page 23 of transcript), and we submit the proceedings should have been dismissed as stale.

II.

THE LIBEL IS INSUFFICIENT.

All we find in the libel to apprise the claimant of what he had to meet was that "the boilers on said "defendant were in an unsafe, dangerous and de- "fective condition" (page 13 of transcript). "Went "to sea on the 19th day of January, 1908, with said "boilers in a dangerous and defective condition" (page 14 of transcript).

The boilers may have been in an unsafe, defective and dangerous condition from numerous causes, and the claimant had the right to know in what particulars the libellant claimed they were in that condition and to know what it had to meet on the trial.

Rule 23 of the Rules of the United States Supreme Court in Admiralty, having the force and effect of a statute, reads in part:

> "The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his

> suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article. * * * ''

All this libel contains is the *conclusion* of the pleader; there is not a statement of fact in it, and nothing to answer as to libellant's claimed cause of action, excepting conclusions.

> The Osceola, 66 Fed. Rep. 347;
> The Albion, 123 Id. 189.

Claimant having excepted to the libel for insufficiency (page 17 of transcript), we submit the exceptions should have been sustained.

III.

THERE IS NO EVIDENCE OF NEGLIGENCE IN THIS CASE. ON THE CONTRARY, IT ALL SHOWS EXTRAORDINARY DILIGENCE.

The law applicable to a case like this is, that an employer is not an insurer; all that he is held to is ordinary care, and the burden is on the libellant *to show negligence.*

The law on the subject is correctly stated in the following language,

> Texas & Pacific R. Co. v. Barrett, 166 U. S. 617,

a boiler explosion case, where the Court, speaking through his honor, Mr. Chief Justice Fuller, said as follows (page 618):

> "That the master is not the insurer of the safety of its engines, but is required to exercise

only ordinary care to keep such engines in good repair, and if he has used such ordinary care he is not liable for any injury resulting to the servant from a defect therein not discoverable by such ordinary care", "that the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine or in keeping it in reasonably safe repair"; and "that a railway company is not required to adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable and customary; but that it fulfills its duty in this regard *if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances,* * * *" but that "the burden of the proof is also on the plaintiff throughout this case to show that the boiler and engine that exploded were improper appliances to be used on its railroad by defendant; *that by reason of the particular defects pointed out and insisted on by plaintiff the boiler exploded and injured the plaintiff.* The burden is also on the plaintiff throughout to show you the extent and character of his sufferings and the damages he has suffered by reason thereof. You must also be satisfied that plaintiff was ignorant of the defects in the boiler that caused its explosion, if the evidence convinces you that such was the case, and that he did not by his negligence contribute to his own injury."

The Court held the instructions correct.

In the case of Richmond & Danville Railroad v. Elliott, 149 U. S. 266, the same Court says, on page 272:

> "Applying these rules, if the railroad company after purchasing this engine made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests had disclosed no defense, it cannot in an action by one who is a stranger, be adjudged guilty in negligence because there was a latent defect, one which subsequently caused the destruction of the engine and injury to such party."

Further up on the same page the Court says:

> "If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, etc."

In the case of Chicago R. R. Co. v. Dubois, 65 Ill. App. 142, a boiler explosion case in which plaintiff recovered a verdict of $5000.00, and where not near the diligence was shown as is shown in this case, the Court of Appeals of Illinois reversed the judgment without remanding the case for a new trial, and held, as we read the decision, that an examination by an inspector was sufficient diligence.

Same case, 56 Ill. App. 181.

In Brimsby v. Hawkins, 56 Fed. Rep. 400, a case in which the explosion of a steam boiler on a steamboat was in issue, it appears that within one year prior to the explosion, the boiler, machinery and appliances were inspected, approved, and licensed for one year by the government inspectors; that

within three days prior to the explosion they were examined and thoroughly cleaned, etc., and it was held that there was no negligence.

Olive v. Whitney, 103 N. Y. 292;
Thompson's Commentaries on the Law of Negligence, Sections 3926, 3927, 3928, 3929, 3930.

The boiler in this case was a high-class boiler in general use on steam vessels (page 45 of transcript). The Babcock & Wilcox boilers are a high standard boiler (transcript page 99). This boiler was inspected by the U. S. Boiler Inspectors at Portland in May, 1907, and in San Francisco May, 1908 and 1909, the boilers showing good care. They were cleaned every 12 days (page 46), Mr. Flinn testifying *that every tube was cleaned* (page 46).

The boilers were examined every time they were cleaned, by holding a candle at one end and looking through it, and then by going into the furnace and examining as far up as they could do, and it was done in San Francisco, just before the accident (same page, and pages 57 and 58).

" Q. You state that all the tubes to-day are as
" good as this (pointing)?
" A. Yes, sir.
" Q. How do you know?
" A. Because I have gone through them every
" three weeks.
" Q. You know this is a very bad tube (point-
" ing)?

" A. I don't know that it was bad.

" Q. How do you know the other tubes are as " good to-day?

" A. Through my examination of them with a " candle.

" Q. You only examined that with a candle?

" A. I had a light to see.

" Q. Is there any means of finding out and prop- " erly examining these tubes when their life is com- " ing to an end?

" A. They are inspected and a hydrostatic pres- " sure put on them.

" Q. You rely on that solely?

" A. No, sir, not solely.

" Q. What other means do you adopt?

" A. Examine the boiler every time we clean it.

" Q. With what, a candle?

" A. Yes, sir.

" Q. Is that all?

" A. That is all we can."

Mr. Grundell (page 109):

" Q. What method is adopted for examining the " tubes in the middle of the boiler, not on the out- " side?

" A. You can see through all of the tubes by " taking the plate off opposite either end. They are " in clusters of four. You can see through four by " holding the candle on the opposite end."

We take the liberty of inserting the following extracts from the testimony on the matter of scale. Flinn, the chief engineer, testified (page 47):

" We had a tube scraper, a hand scraper, and a " fresh-water hose. The stuff we removed there was " nothing more than red mud. There is a light coat " or scale on tubes that prevent pitting: we never " care about removing that. That is for the protec- " tion of the tube. There was a formation of red " mud. We used to get that about a thirty-second " or a sixteenth of an inch thick. We used to take " that out with a hand scraper."

Page 59:

"Q. I will ask you about the tubes generally; " were they all in the same condition as this?

" A. Yes, sir.

" Q. No more showing of scale on any than there " is on this?

" A. No, sir.

" Q. This does not show any scale at all?

" A. That is all the scale we ever had, a scale we " never care about removing, because that prevents " pitting. There was nothing but red mud on and I " could put the hose on and take it off with my finger " outside of the scale that was underneath the red " mud."

Page 54:

" No such condition. The scale that was in those " tubes was about as thick as my finger nail. Scale " is not advisable to be removed. It is a protection " to the iron. It prevents pitting. All I have seen " in those tubes since I have been running is red " mud."

Page 70:

" Q. Would it remove the scale?

" A. There was not enough in it to have it re-
" moved.

" Q. It would not remove the scale?

" A. There was no scale to be removed.

" Q. I ask you the question.

" A. Yes, sir, it would.

" Q. That scraper would remove the scale?

" A. Yes, sir, it would."

John K. Bulger, U. S. Inspector (page 81):

" Having the tube in question in his hand.

" Q. You think at some time that tube has been
" choked up with scale?

" A. *I do not think so* because I took that."

Page 90:

" Q. What do you mean by clean? You mean an
" absence of scale?

" A. There might be a little fill. *As near clean*
" *as they possibly can be.*

" Q. We come to this question, if just prior to the
" accident these tubes were absolutely choked up
" with scale, so much so that it was impossible in
" many instances to drive a bar through them, could
" they, in your judgment, have been in that condi-
" tion you found them in when you made these in-
" spections?

" A. *No, sir;* if they did they would have burned
" out."

Edwin S. Hough (page 105):

"Q. Do you see any evidence in these tubes to "indicate there was an obstruction caused by scale "or anything else?

"A. I see none.

"Q. Had there been such an obstruction what "would have become of the obstruction on the blow-"ing of the tube?

"A. That would have been blowed into the fur-"nace."

Charles H. Bates (page 116):

"Q. I will ask you whether or not those tubes "choked up with scale or foreign substance?

"A. Not to my knowledge. I never saw any "scale to amount to anything in them.

"Q. You never saw any scale to amount to any-"thing I got in?

"A. Yes, only the usual amount in those kind of "tubes.

"Q. No quantity that could cause any damage?

"A. No noticeable quantity.

"Q. How often did you look at them?

"A. I always did before the second assistant "closed them up, and the chief engineer did the "same."

There is some question about the kind of scraper that was used. We quote the following testimony in addition to the above:

"Q. Was any pipe driven through or any bar?

"A. No, sir, nothing. There is a hand scraper,

" a two-inch, with a three-quarter gas pipe attached.

" Q. What kind of a tube scraper did you have " for the two-inch tubes?

" A. An ordinary hand scraper.

" Q. I should like you to explain that.

" A. You have seen it. It is a round scraper, " split in half, with a round circle, with a lock and " spring on it.

" Q. Did you ever attempt to clean the tubes with " a sponge and scraper which you use in a scotch " boiler?

" A. Yes, I did, it was three years ago.

" Q. You had nothing, having such a scraper as " that?

" A. Yes, sir.

" Q. Did you have one of the regular cutter " scrapers?

" A. They were not in vogue at that time to my " knowledge. I never seen one. * * *

" Q. Have you got one now?

" A. Yes, sir.

" Q. With three cutters on it?

" A. Yes, sir."

Page 68:

" Q. On this question of the scraper, please de- " scribe again what the scraper is that was used "by you?

" A. It is a hand scraper made of steel, made " out of flat steel, half round, with a spring and " nut on it. Before it enters the tube it is opened

" three or four inches. The scraper cleans all the " soft mud out of the tube.

" Q. Was it sufficient for the purpose for which " it was used?

" A. Yes, sir.

" Q. And cleaned out the tubes all times before " the accident?

" A. Yes, sir."

See page 69:

" Q. You say the sort of scraper you now use?

" A. We are using a turbine."

Page 70 (continuing):

" Q. Three little sharp cutters?

" A. Yes, sir.

" Q. To cut the scale, and they work like three " wheels?

" A. Yes, sir.

" Q. That is because the scale is so hard?

" A. No, sir; we are using different water. We " are giving what they call alum in the boiler water, " and it makes it hard to clean.

" Q. Now you have a turbine cutter?

" A. Yes, sir, it is a quicker method than the " other way. We are not allowed so much time on " this run as the other. We could not get through, " so I put it up to Mr. Doe to get me one of the " turbines, and we cleaned the boilers in a day. It " is a quicker process."

Mr. Bulger testified (page 87) that the turbine scrapers first came into use about two years prior

to the time he was testifying, to wit, about the time of this accident.

Mr. Grundell, employed by the Babcock and Wilcox people, testified (page 106):

"Q. You heard Mr. Flinn, the engineer, testify-
" ing about the scraper which he used?
"A. Yes, sir.
"Q. Was that the scraper such as furnished by
" the Babcock & Wilcox Company?
"A. Yes, sir, with the boiler.
"Q. For the purpose for which he used it?
"A. Yes, sir."

We think the above shows conclusively that the owners of this vessel did all that it was possible to do. There is no question about the competency of the engineers on this vessel. The boilers were cleaned every twelve days or at the most three weeks. Each time they were cleaned they were inspected in the only manner possible. No evidence of fault was found in them. All the witnesses whose testimony is worthy of consideration testify that there was no evidence of the trouble being caused by scale, and that there was no scale in the boilers, or tubes. The vessel was inspected by the government inspectors at Portland, May, 1907, and a hydrostatic pressure of double the amount carried at the time of the explosion put on them. She was further inspected the May following the accident and the boilers then *showed good care*. In the two boilers on the vessel there was 704 tubes. The May follow-

ing some four-inch tubes were taken out of the other boiler. On the day of this accident one other tube gave out, but with that exception the other 702 still remained two years after the accident and all were in first class condition. There was 6336 feet of two-inch boiler tube in this vessel, and 6318 feet of it was still in good order and in the vessel at the time of the trial of this case, and that that was taken out was still in good order excepting only about nine inches of it.

As Mr. Bulger testified (pages 83-84):

"Q. It must occur that such an accident as this "would happen. Can you conceive of any other "cause of this occurrence than an obstruction in "the tube?

"A. I would think, if there was an obstruction "in that one tube, the other tubes would certainly "be the same.

"Q. I am not talking about that.

"A. *There would not be a single tube* with the "same obstruction, the same water, and the same "circulation, and everything else."

It frequently happens that boiler tubes blow out and explode when first put in and the vessel is on her trial trip.

Mr. Bulger (page 86):

"Q. Is it not a fact, Mr. Bulger, that sometimes "on the first trip of a vessel, with new boilers, that "boiler tubes blow out?

"A. Yes, sir."

Mr. Hough to the same effect (page 99).

All the owners of the vessel could do in this case was to use ordinary care in the inspection of the boiler before the vessel left port. What happened to the tube afterwards in the ordinary use thereof they are not responsible for.

The testimony is uncontradicted that they did this. Both Mr. Flinn and Mr. Bates testified they inspected the boiler, the testimony of the other witnesses show that it was inspected in the only manner possible, and what else could be done? There was nothing else they could do. Where is there any evidence of negligence?

An employer cannot be on hand every minute. If there was scale in a tube and it caused it to explode and it could not have been *discovered by the ordinary means, the employer is not responsible.* If there was scale in this tube, which we deny, the only method of ascertaining its presence was used and none was discovered, and the employer did all that he was required to do.

As the Supreme Court said in the case of Northern Pacific Ry. Co. v. Dixon, 194 U. S. 338, at p. 346:

> "But the master does not guarantee the safety of place or of machinery. His obligation is only to use reasonable care and diligence to secure such safety. Here the company had adopted reasonable rules for the operation of all its trains. No imputation is made of a want of competency in either the train dispatcher or the telegraph operator. So far as appears, they were competent and proper persons for the work in which they were employed. A momentary act of negligence is charged against the tele-

graph operator. No reasonable amount of care and supervision which the master had taken beforehand would have guarded against such unexpected and temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere and at all times, and in the nature of things cannot guard against every temporary act of negligence by one of his employees."

This is not a case where no attempt was ever made to inspect or keep the boilers clean. All the testimony shows that *they were constantly cleaning them* and *constantly inspecting them* in the manner in which all such boilers are inspected, and no fault was discovered. This is a case where the highest skill and diligence and the most approved methods were used. Under such a state of facts a decision holding the employer liable makes him a guarantor of the safety of the machinery and an insurer, which is not the law.

This tube gave out because of a *latent defect*. We quote the following uncontradicted testimony upon that point. Witness John T. Flinn (page 54):

"Q. I will ask you is it possible in a case of "boiler tubes or any steel construction or rolled "plate or wrought iron for a flaw to exist which is "not visible before inspection?

"A. Yes, sir.

"Q. Please explain more fully.

" A. You can have a tail-shaft made for a vessel, " and pass inspection by Lloyd's inspector, and when " you get outside of the heads you find a break or " flaw in the iron. It is (not) possible to detect " it. It is the same case with a tube. A tube can " be manufactured in the same way.

" Q. So that with the most careful inspection it " would not be visible looking at it from the outside.

" A. Unforeseen.

" Q. Some such thing as slag or some foreign " substance?

" A. It is pretty hard to say what was the cause " in a case of that kind. It is the same as a shaft. " It can be turned up in the lathe and look as good " as it ought to be, and when you get outside you " find a flaw in it. It is a defect in the iron.

" Q. With reference to this particular tube, there " was nothing from an outside inspection which dis- " closed any defect in the composition?

" A. No, sir."

On page 65 he testified that the tube was thinner in the part it let go than in any other part.

John K. Bulger, U. S. Boiler Inspector, testified that he had made an investigation of this matter shortly after the accident and on page 75 he testified:

" Q. You concluded did you not, therefrom, that " it was caused by a latent defect in the tube?

" A. I claimed it was defective tube and *impos-* " *sible to see* in the position it was placed in the " boiler."

Can an employer be held responsible on that state of facts?

" Q. The accident occurred through the latent " defect in the tube?

" A. That was my opinion.

" Q. Which was not discoverable before the acci- " dent?

" A. No, sir. The only way to discover it was " to cut it out and draw the tube through one of " the boxes the same as they do on a Scotch boiler, " draw out one or two and try them, and replace " them with new ones."

In the event that they had drawn one or two tubes out of 704 it is very unlikely they would have happened to have got the tube in question.

This witness' testimony that it was impossible to see this tube is borne out by the fact that beneath it were two rows of two-inch tubes and one four-inch close together, to wit, about ¾ of an inch apart and above it ten rows of two-inch tubes (see blue print, page 183).

Same witness (page 77):

" Q. What would be the cause of a blister?

" A. Many things. It may have been a lamina- " tion.

" Q. Ordinarily a blister would show good tensile " strength but it had become overheated?

" A. I do not understand you.

"Q. Where a blister is in a tube or piece of " iron, it would ordinarily show that the tensile

" strength of the iron or steel was good, but that " it becomes soft by heating, so that the pressure of " the steam forces it out?

" A. It would not soften that very well, if you " had water in it.

" Q. That would be usually the cause of a blister?

" A. Yes, sir.

" Q. Either any scale on the inside or by the lack " of circulation?

" A. Yes, sir.

" Q. So that blister would usually be caused by " scale or lack of circulation?

" A. Yes, sir.

" Q. A latent defect in the lamination would " never form a blister?

" A. It would, if it was on the outside.

" Q. If the defect in the lamination was on the " outside?

" A. Yes, sir, according to how it lay in that " material, the rolling up of it.

" Q. This had become thin, this pipe?

" A. *It was not thin until after the accident. It " has been drawn for some reason. After that when " it spread, there was a weakness in that tube that " made it spread out like that, and it opened out like " that.*

" Q. Do you think from the appearance of that " tube that it could have spread so as to become " thinner without being overheated just as you have " testified or by defective lamination; could that " tube have expanded without being overheated or

" heated to a degree of say 1200 degrees or 1500 de-
" grees, in ordinary terms thinner?

" A. The tube shows for itself that it was over-
" heated.

" Q. It shows that it has been overheated?

" A. *Yes, sir; a little overheated, and drawn*
" *down soft. The tube was perfectly straight when*
" *it was put in.*

" Q. *Sometime it has been overheated?*

" A. *It must have, to get it.*"

There is an error in the reporter's notes in the last answer. The witness was then testifying to a piece of tube he had in his hand. The piece that was fractured was not in Court, as the witness testified (pages 75 and 76) that it was lost. On page 77 he reported finding it during recess. The last answer given above was given as the Court adjourned. On page 82 it appears there was another recess, as the following appears:

"(A recess was here taken until 2 P. M.)"

The testimony of the witness on page 79 shows that the recess was taken at that point, and is important in showing what tube the witness testified to in the morning. He certainly was not testifying to the fractured part as the transcript shows that he testified in the morning that it was lost, and at two o'clock he produced it. What the witness said was that the piece he had in his hand must have been overheated to get buckled, it not being straight.

On page 119 Charles H. Bates testified that the piece Mr. Bulger was testifying to became crooked by reason of their having to bend it in taking it out.

On page 127 Albert Flinn testified to the same thing.

On page 133 John F. Flinn testified to the same thing.

On page 80 Mr. Bulger again testified:

" Q. I will ask you this question: is it not a fact " that this defect in your judgment was not a hidden " and latent defect?

" A. That is the decision that I rendered in the " case.

" Q. And that is your opinion?

" The COURT. Q. On what do you base that " opinion?

" A. I base it on the tube itself. It proves it.

" Q. On the tube itself?

" A. Yes, sir.

" Mr. LISTER. Q. You say that this is a latent " defect. What is the difference between a patent " and latent defect?

" A. Between what?

" Q. A patent and latent defect. Those are the " two ordinary terms.

" A. I suppose the one could be observed is the " patent, and the one that could not be observed is " the latent. * * *

" The COURT. I suppose what you really want " to know of the witness is whether that condition

" then is apparent, whether with the exercise of rea-
" sonable care that could have been observed while
" it was in the boiler.

" The WITNESS. That may have occurred there
" in two hours, *in that shape.*"

If the witness is correct in that answer how should the owner guard against, that they could not stop the vessel every two hours, blow the boiler down, and wait for it to cool, then inspect and get up steam again and proceed on their voyage?

The libellant assumed the risk of what happened while the vessel was at sea.

" Q. The blister would come from the overheat-
" ing of the tube?

" A. I would not say that. I am not in a posi-
" tion to say. I don't know.

" Q. It has the appearance of being caused by
" being overheated at some time?

" A. The tube shows that it has been overheated
" a little. But if the lamination was drawn, it may
" have spread out."

Just when the overheating occurred does not appear from the testimony of this witness. It may have occurred at the time of the manufacture of the tube, and the Court ought not to have assumed that it occurred while the vessel was being operated by its owners. The witness then shows clearly that the explosion was not caused by scale.

" Q. You think at some time that tube has been
" choked up with scale?

" A. *I do not think so because I took* that" (remainder of answer not in transcript).

Page 84:

" Q. Can you advance any theory whereby it " would sag down, swell up, and burst, if there was " a free circulation of water through it?

" A. I have told you that that tube, in my opin- " ion, is softened from the heat, drawn down, *and* " *with the defect there was in that tube, which* " *should have stood the pressure that was on the* " *boiler, the defect in that tube when it blew,* it drew " on that point which was the weakest point in the " tube.

" Q. Can you account for any theory why this " tube became overheated?

" A. *Because I think the tube was defective.*

" Q. In what way?

" A. There might have been a lamination and it " never gave out until the drawing of the tube."

This witness' testimony is clearly, when taken as whole, that the tube gave out because of a latent defect, that if it had not been for such defect it would not have given out, that the boilers were clean and showed good care, that it was impossible to discover the defect, and that the overheating was caused by the defect. We must remember that the testimony shows that after the explosion the fuel oil and flames were still going in the furnace, until Flinn went down and shut it off (page 55). This tube was, when broken, subjected to flames and a

fierce heat, and whether it obtained an appearance of being overheated after the explosion or before no human mind can tell.

Same witness (page 86):

"Q. The hidden defect of that boiler is not "visible, as I understand you, from an inspection "of the tube as it is in the boiler?

"A. No, sir.

"Q. It is not visible upon inspection?

"A. No, sir."

The witness then goes on to say that he could not tell what the condition of the tube was when the vessel left port, and that you could not tell by the inspection of any tube whether it was of the same thickness throughout.

Edwin S. Hough (page 99):

"Q. And it is your opinion that this tube gave "out because of some such latent defect as you have "testified to?

"A. I can see no other reason."

See, also, page 88.

Charles L. Grundell (page 107):

"Q. Did you form an opinion as to whether it "was caused by a latent or patent defect?

"A. I should say latent.

"Q. And what do you mean by latent defect?

"A. That the iron in manufacturing some way "becomes defective."

As we have already shown, it appears all the way through the evidence that boiler tubes give out even when new, and there is no way of guarding against it. That is one of the risks assumed by the employee.

There is no contradiction of the foregoing testimony, and the following decision is applicable to this case:

> Patton v. Texas and Pacific Railway Co., 179 U. S. 658, at page 663.
>
> "Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (here follow authorities), a different rule obtains as to an employe. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that *any one of half dozen things may have brought about the injury*, for some of which the employer is responsible and for some of which he is not, it is not for the *jury to guess* between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

The testimony of the claimant shows overwhelmingly that the tube in this case gave out because of a latent defect. The evidence of the libelant did not in any way refute that, their theory being that in over six thousand feet of boiler pipe scale lodged in one spot a few inches in length and caused the explosion. Claimant's proof shows that there was no scale.

We will now take up the testimony of the libellant and see if it shows that.

The libellant is evidently a Greek. He had been a fireman for 16 years (page 39 of transcript), and testified through an interpreter. He said he had been on the F. A. Kilburn three months at the time of the accident, and never worked in the fireroom. All the other witnesses who were on the vessel but one *say that he did.* He said on page 41 that the vessel used to be in port every three or four days, as they made weekly trips; that corresponds to Mr. Flinn's testimony that they had three or four days to clean the boilers. On page 46 he testified that they used to clean the boilers, but did not have time. They used to clean five or ten at a time. It is in evidence that there were five men in the fireroom cleaning tubes all the time the vessel was in a port and he claims they cleaned but five or ten tubes at a time. The fact that he testified that they took out scale shows that they cleaned them, and his testimony, considering his interest in the case, that five men cleaned but five or ten tubes in three or four days, is entitled to no weight whatever.

The next witness was J. Constantine by deposition. He says he was *an oiler,* and the chief engineer, Flinn, the 1st assistant, Bates, and Albert Flinn, who worked in the fireroom, say that Constantine did not work in the fireroom at all but in the engine room (pages 53, 118 and 127-128 of transcript). It does not clearly appear from Constantine's testimony whether he wished to be understood as testifying that he worked in the fireroom. It appears from his answer that he was illiterate, and evidently a Greek.

The effect of his testimony on page 140 is that two days before the accident the boiler tubes were dirty at Boole's shipyard *and they cleaned them,* and got some scale out of them. A natural supposition, if they had not been dirty they would not have needed cleaning. We think it will be conceded that scale forms, and has to be removed in so far as it is advisable to remove it. He then claims they did not have a proper scraper. The testimony is *that they had the scraper that was in general use at that time.* He claims that they used a pipe and drove it through with a hammer. The blue prints attached to the transcript show that would be impossible, as the head of the boiler is so thin that it would not stand hammering. And there is abundant testimony to show that. His testimony is to the effect that the exterior diameter of the tube they drove through was a trifle smaller than the interior diameter of the boiler tubes.

The fact that such a tube would not go through does not show the presence of scale, for the reason that the slightest bend in either tube would stop it from going through. We call the Court's attention to the lower part of page 90 and pages 91 and 92 of transcript, where counsel for libellant assumes that the piece they tried to drive through was of about the same diameter as the boiler tube, and the remarks of Judge De Haven on page 93, as follows:

" The COURT. That is what he assumed. Now, " he is assuming that there was a very slight bend " in the tube, and you undertook to force something " through of the same diameter, you cannot do it."

On page 145 the witness said:

" A. Of course, when the pipe goes through some " of the stuff begins to drive out. *We got to get* " *the pipes clean.* When we wash it out at the back " this stuff comes out. We couldn't see the back " side, because the pipe goes in from the front end."

The only construction that can be given to his testimony at the lower end of page 146 and on page 147 is that they had to get the pipes clean and did so by driving the tube through.

The next witness was John Malikis, also evidently a Greek. He testified in part (page 151):

" Q. Did you in the course of your employment " clean the tubes of this boiler?

" A. Yes, sir.

" Q. Did you clean the tubes of the boiler alone, " or did some one else assist you?

" A. One fireman, one oiler and engineer all the " time.

" Q. How long before this accident occurred, on " Jan. 19, 1908, did you clean *this tube?*

" A. We tried to clean it about 4 days before the " explosion. * * *

" Q. Did you ever scale this boiler?

" A. No; I sponge with the brush—*can't scale a " tube boiler with a hammer.*"

On the lower part of the page he says all the tubes were blocked up.

On page 154 he said:

" A. I can't tell you, about 50 and not 250. The " bar pass *through all* after hitting with the big " hammer.

" Q. When was the work of cleaning these tubes " done before the time at Boole's Shipyard?

" A. Never clean *all tubes before at one time.*"

The witness states clearly there that all of the tubes were cleaned at Boole's Shipyard.

On page 155 he said that they cleaned the boilers on the "Minnesota" with a hammer.

On pages 156-157 he testified that the libellant cleaned tubes at Boole's Shipyard.

The only effect of Malikis' testimony is that all of the tubes were cleaned at Boole's and consequently all the testimony there is in this case to warrant a finding that there was scale in the tubes that was not taken out is the last answer of Con-

stantine on page 143. We say his testimony as a whole shows that the tubes were all cleaned at Boole's. And the testimony is overwhelming that he, Constantine, did not work on the boilers at all at Boole's but that Hanos did.

There were two firemen on this vessel, Hanos and Malikis. Malikis says that he and an oiler (Flinn says he was the oiler), and one other fireman, and an engineer, worked in the fireroom. He says the fireman was Hanos. All the testimony is that Constantine was an oiler. If Constantine was there there would have been two oilers. His testimony about the boilers is thus *rank perjury,* and it is all there is in this case to support the decree.

We submit that not only is the decision in this case *against the weight of the evidence, but that there is no evidence to support it.* A judgment such as this cannot be founded on mere conjecture, or upon a guess, the proof must be clear and positive.

Is it reasonable to suppose that when constant diligence is shown, as is shown in this case by all of the witnesses—as to the details of men for cleaning the boilers—that they would have allowed them to get dirty?

But we have stronger proof than that, the tubes themselves are the best evidence of what their condition was as to scale. The Court has them before it.

The decision of the lower Court was based solely and only, as to negligence, upon the statement of

Mr. Bulger, that from the appearance of the tube, it looks as though it had been overheated.

We have already pointed out, but cannot too strongly emphasize the fact that the testimony was heard by Judge De Haven. Judge Donworth had only the typewritten record of the evidence before him. Your Honors will find, upon an examination of the record, that the witnesses testified frequently with reference to the different pieces of tube, by referring to them as "this" or "that", and it was impossible for Judge Donworth to know to what piece of tube the testimony referred, when Mr. Bulger said it had the appearance of having been overheated. There are six pieces of tube in evidence, and, as already pointed out, when Mr. Bulger gave his testimony about the tube having the appearance of having been overheated, the portion of the tube that had blown out, had not then been found and it can therefore be conclusively stated that the bursted tube was not what was referred to. Evidently, the tube referred to was the one next to the tube that had blown out, and which was also taken out and is in evidence as an exhibit, and this last mentioned tube, is crooked, or bent. From the appearance of this tube (in that it was crooked), Mr. Bulger concluded that it looked as though it had been overheated. This was not the tube that had blown out.

Furthermore, the bent condition of this tube was afterwards explained as having been caused in taking it out of the boiler, in that a stanchion was in the

way and the tube had to be bent in order to get it around this stanchion. The reason for the bent condition of the tube did not appear at the time that Mr. Bulger gave his testimony, so that his conclusion, that the tube had the appearance of having been overheated, which is the sole evidence which Judge Donworth based his conclusion of negligence upon, can have absolutely no weight in the determination of this case.

Furthermore, taking the conclusion of Mr. Bulger as correct, viz.: that the tube had been overheated, wherein does this fact alone make out a case of negligence as against this defendant? Where does this reasoning lead us? Assuming, for the sake of argument, that the particular tube that had burst, had at one time been overheated, and as pointed out, this is not a fact, and was not proved, the Court had to then *presume* that the overheating was caused by a want of circulation in the tube; and *presume* that the want of circulation in the tube was caused by an obstruction therein; and *presume* that this obstruction was scale which had not been removed from the tube; and then *presume* that the failure to remove the scale was due to the negligence of the officers of the Kilburn.

It needs neither argument nor citation to prove the rule that a presumption cannot be based upon a presumption.

Cyc., Vol. 16, p. 1051, says:

> "No inference of fact should be drawn from premises which are uncertain. Facts upon which

an inference may legitimately rest, must, it is said, be established by direct evidence as if they were the very facts in issue: one presumption cannot be based upon another presumption."

Encyclopedia of Evidence, Vol. 8, p. 880:

"One presumption cannot be based upon another presumption or inference, but, must be founded upon facts in evidence."

There was no evidence that there had been a lack of circulation in the tube; there was no evidence that this lack of circulation in the tube, if any, was caused by a packing of the tube through scale or that there was any other obstruction therein; and there certainly was no evidence that would warrant the Court in finding that an overheating of a tube can only be caused by an obstruction in the tube preventing the free circulation of the water. Common sense alone tells us that a tube in a boiler may become overheated in many ways; and there is certainly no evidence that the only way in which a tube can be overheated is through want of circulation; and that want of circulation can only be caused by an obstruction in the tube.

Taken in conjunction with the uncertainty of Mr. Bulger's meaning when he said the tube looked as if it had been overheated, and the evident fact that his remark was not addressed to the tube in question, but to the other tubes in evidence, or one of them, the finding of the lower Court that the conclusion of Mr. Bulger that the blowing out of the tube was caused by a latent defect is not borne out by his

reasoning, cannot be sustained, and full force and effect must be given to the opinion of Mr. Bulger that the bursting of the tube was caused by a latent defect.

It must therefore stand as a proposition of law that the opinion of the lower Court cannot be sustained, since it is at best based upon several presumptions, not alleged, not proved, not sustained, and these presumptions in turn based upon a finding that is in itself doubtful in the first instance, the finding that the tube had been overheated, a finding evidently made by the lower Court under the impression that the remarks of Mr. Bulger referred to the tube that burst, when as a matter of fact that particular tube at that time had not been produced. Judge Donworth, not having heard the testimony, and depending entirely upon the typewritten record, which is very vague where the exhibits are referred to, evidently thought that all the references to tubes in the record all applied to the particular tube that burst, whereas as a matter of fact, there were several pieces of tube put into evidence, and the printed record does not show which particular pieces of tube were referred to at the different times by the several witnesses.

CONTRIBUTORY NEGLIGENCE AND NEGLIGENCE OF FELLOW SERVANTS.

It is unnecessary, under this head, to enter into a long dissertation upon the rules of law as to con-

tributory negligence, or upon the rule that a master is not liable where the injuries result from the acts of fellow servants of the injured party. Neither is it necessary to quote law, or state legal principles to show that Malikis and Constantine, the other firemen and oilers, were fellow servants of Hanos, the libellant. I believe that the latter fact will be admitted by libellant, and the foregoing propositions of law will be conceded. Should they not be, we will be prepared to quote authorities and argue these propositions more fully upon the hearing. The only propositions which we desire to submit at this time, in connection with the foregoing, is that the evidence shows clearly that if there was any negligence at all causing the accident, it was necessarily either the negligence of Hanos himself or of his co-workers.

The question of negligence is based solely and only upon the theory that the failure of the respondent to clean out the boiler tube in question, caused the scale to so block up the free passage of the water through the particular tube that burst, as to prevent the circulation of the water in the tube, and its consequent bursting from the heat, or otherwise, in its burning up.

There is no dispute, and in fact libellant himself, as does his other witnesses, testify to the fact that the tubes were cleaned out regularly, there being some dispute as to how many tubes were cleaned on each trip, or in other words the dispute seemed to be as to how long it took before all of the tubes in

a boiler were cleaned. There is no dispute that some of the tubes were cleaned after each trip, and particularly the lower ones, since they were the easiest to get at. Whether all of the lower rows of tubes were cleaned after each trip or not, becomes immaterial in view of the testimony of all of the witnesses, both for libellant and respondent, that two days before the accident, the vessel lay on the ways at Boole's Shipyard, when both of the boilers were overhauled, and *all of the tubes that needed cleaning, and in fact the testimony of Flinn and of Malikis, Flinn, the chief engineer, and Bates, is that all of the tubes were then cleaned.* Since this fact stands conclusively proved and not disputed, and since the libellant himself and his co-workers were the only ones set to work to clean the tubes, the conclusion must naturally follow, that if the particular tube that burst was overlooked in the cleaning process, or if it was so defectively cleaned as to have permitted an accumulation of scale or mud to remain in the tube, blocking up the tube and preventing circulation, and causing it to burst, the negligence was that of either the libellant himself, or of his fellow workmen, and no other deduction is possible under these facts. Under no circumstances can defendant or respondent or its officers be held negligent under the circumstances.

IF THE LIBELLANT WAS ENTITLED TO DAMAGES, THE METHOD BY WHICH THE COURT COMPUTED THEM WAS ERRONEOUS.

The Court allowed the following items of damage:

$500.00 for expenses. The libellant said on that item (page 37 of transcript):

"A. I was over $1000.00 out of my pocket."

The only testimony there is to support that is that he was at the French Hospital for four weeks and paid $21.00 per week, and $10.00 extra for bandages (page 38 of transcript). The Court said that board was included in the $500.00. The libellant testified that his expenses at Monterey were paid by the charterers of the vessel. He also testified that he was in a hospital 40 days (page 36). On page 37 he says as follows:

"Mr. LISTER. Q. Who paid your expenses at "Monterey?

"A. The company who rented the steamship."

On page 38 he says he then went to the Marine Hospital, and then to the French Hospital. He had no expense there. He then went to the French Hospital. He had no expense for board there. The only expense he had then was for the hospital, as the charterer of the vessel paid his doctor (page 38).

"Q. Were you treated by Dr. Lilly for your "hands?

"A. Dr. Lilly has been paid by the company."

He was thus allowed $500.00, when the evidence shows the amount he expended was $94.00.

The Court next allowed $500.00 for pain and suffering. If he is entitled to any damages, which we deny, of course we cannot question that amount.

The Court next allowed $800.00 for the cost of an operation, including the loss of time involved therein.

There is absolutely no proof of what such an operation would cost or that he was going to have one performed, and the libellant testified that he was not earning anything and could not, so he certainly could not be entitled to damages for loss of time.

The Court then allowed $2000.00 for permanent impairment of earning capacity. If the libellant was entitled to a decree of course we could not question the Court's finding upon that. But we do question the amount of $2380.00 for loss of time up to the time of the trial, for the reason that his own physician testified that by an operation he would have recovered the use of his hands to some extent. On page 38 he said an operation would be almost sure to get some results.

Now it is the duty of all persons to reduce the damages by any ordinary means, and it was the duty of the libellant to do so at the time he was first injured. If his permanent impairment is only $2000.00 now, that is all the damages he could in any event have obtained if he had had the operation performed at the time his injuries first occurred, and he cannot lay back and negligently charge the loss, which he would

not have suffered except by his own negligence, up to his employer. That item is improper.

In the case of the "Baltimore", 75 U. S. 376, the Supreme Court said, on page 387:

> "Persons injured in their property by collision are entitled to full indemnity for their loss, but the respondents are not liable for such damage as might have been reasonably avoided by the exercise of ordinary skill and diligence after the collision on the part of those in charge of the ship."

The same rule applies to injuries to the person.

Texas Pac. Railway Co. v. White, 101 Fed. Rep. 928. See pages 931, 932 and 933. A case where there was a failure to procure medical assistance and the United States Circuit Court of Appeals for the Fifth Circuit held that it was error for the Court to refuse a charge that it was the duty of the plaintiff to have done so, etc.

It may be urged that the libellant was poor and could not employ a surgeon. He had the United States Marine Hospital open to him free of cost. Of course he was not compelled to go there, but there is no evidence that he ever made any attempt to improve his condition, and we must assume therefore that he made none.

We submit that if the libellant had been entitled to damages he could not under the proof be entitled to any more than $2594.00.

The Court commented in its opinion that the matter of laches was not argued. This case was argued twice; once before his honor Judge De Haven; the second time, without sufficient preparation on the part of libellant's counsel, before his honor Judge Donworth. But whatever defense there is in a case rests upon the facts and the law. It frequently happens that counsel will not touch upon a point in argument, believing that the Court will observe the point without it. The case was not briefed before either judge.

And sometimes counsel in an argument overlook a point while endeavoring to make themselves clear on another.

The point is never waived by failure to press or mention it on argument.

We respectfully submit that the decree should be reversed, and in any event the damages should not exceed the sum of $2594.00.

SAMUEL ROSENHEIM,
H. W. HUTTON,
BERNARD SILVERSTEIN,
Proctors for Appellants.

No. 1894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

IN ADMIRALTY.

THE MARITIME INVESTMENT Company, (a corporation), claimant of the S.S. "F. A. KILBURN", a steam schooner,

Appellant,

vs.

BASILIOS HANOS,

Appellee.

REPLY BRIEF OF APPELLEE.

FRANKLIN P. BULL,
HENRY B. LISTER,
Proctors for Appellee.

Filed this ..... *day of October, 1910.*

FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*

Hansen Co.

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REPLY BRIEF OF APPELLEE.

The statute of limitations and laches are both affirmative defenses. The Appellant set forth the defense of laches and subsequently willfully and intentionally abandoned it. The mere allegation that machinery is defective and unsafe, without any elaborate specifications of the defects, is sufficient. The Anaces. See 93 Fed. Rep. 240-246.

Appellant's statement of facts on page 3 of his brief should be corrected to say "Some of the boiler tubes were cleaned in this vessel every twelve days." The testimony shows that about 30 tubes were cleaned every 12 days, and as there were 302 tubes in each boiler, making a total of 704, it would take almost a year before a boiler was completely cleaned in the way and at the rate that they cleaned them.

The Appellant in this case appears to be like the proverbial ostrich—it sticks its head in the sand, refuses to see anything and thinks it is safe. Because the officers of this vessel and the owners fail to see a defective tube through negligently failing to look for it in the proper manner, they choose to call it a latent defect. The negligence in this case consists in the fact that a tube, although a patent defect, if properly looked for, was hidden or latent to the owners of the vessel. None so blind as those who will not see—they either didn't or wouldn't see that the scale was becoming too heavy in the tubes for safety, and then pat themselves on the back and say, "because we didn't see it, it is therefore a latent defect."

The Appellant lays great stress on the defense of laches which was wilfully and intentionally abandoned; it is both unjust and improper of the Appellant to blame the Appellee for failure to set forth his defense to the charge of laches after the said Appellant had specifically abandoned the defense of laches. The Appellee could have shown that he was not guilty of laches, that all the delay in bringing this action was caused by the Appellant itself; but as it had abandoned the defense it is useless for the Appellee to talk of what he would have proved if the Appellant had attempted to prove laches. The question of the sufficiency of this

libel in all respects has been covered in the case of The Anaces, 93 Fed. Rep. 246.

Appellant lays great stress and takes great merit upon the fact that every year this boat was inspected by the United States local inspectors of steam vessels; of course it was, for the very simple reason that the United States government refuses to license any vessel until it has been inspected by the local inspectors. But the United States are not guarantors of the condition of the machinery, because they refuse to issue licenses to rotten old tubs. Neither in the cursory examination which the inspectors are able to give to the vessels during the very limited time at their disposal are they able to find every defect which would be apparent upon a more thorough and complete examination of the boilers and machinery. The United States is not in the business of expert consulting engineer for steamship companies; nor would the Constitution permit it. It is sufficient negligence on the part of this company that they failed to have competent experts examine the tubes of this boiler, but merely relied upon the hydrostatic pressure given by the United States inspectors.

An inspection of the United States inspectors is about as follows: The inspector appears upon the boat with a small hand-force pump and a pressure gauge; he asks the engineer: "Are your safety valves all blocked down?" and upon being answered in the affirmative they connect the force pump with the boilers; several of the crew work the pump until the requisite pressure appears upon the gauge; taking his watch out, the inspector examines it for about a minute, and if the pressure does not fall too rapidly, the hydrostatic test is ended; he then takes a lamp, glances in at the fire door, the water is run out of one of

the boilers; a couple of the plates taken out, which are usually prepared and selected by the engineer in advance, and he is shown one or two nicely cleaned tubes; whereupon, after exchanging the compliments of the season, he goes off probably to inspect half a dozen more vessels in the same day, and such an inspection as this, the Appellant considers all that is necessary when a water tube boiler has reached an age that is well known to be dangerous.

Again Appellant relies very strongly upon the fact that the owners of this vessel caused the engineers to examine these tubes by looking at a candle through them. The obstruction or accretion of scale which would be noticeable by looking at a candle through a 9 foot tube would be almost sure to be sufficient to destroy the tube; in other words, to look at a candle through a 9 foot tube is no test whatever of its condition. It would be impossible to tell whether the scale was 1-16 of an inch or ⅛ of an inch thick, and this difference is enough to cause the destruction of the tube. Also this test does not show how much the outside of the tube has been worn or burned.

The testimony shows that the tool used was only intended to remove soft mud, that it would not remove scale; it was a kind of improvised ramrod with a difference that it was made in two halves with a spring between, so that if it should happen to reach a piece of scale that was more prominent than the rest the tool would close up and permit it to pass over the scale without removing it.

The testimony shows that to clean a tube properly would take at the least 15 minutes per tube and an examination of the tube itself in evidence before the Court would show that 15 minutes would be a very rapid time in which to remove such scale as appears

upon the tube. Seven hundred tubes at 15 minutes each would take about a month to clean and yet it is shown that only four days were allowed. Now, if an engineer is allowed only four days to do that which would require 30 days, it is very evident that without any negligence on his part he would have to rush through the work and only take the soft, easily removable mud and leave the hard scale.

To only allow four days for such work is in itself negligence on the part of the managing owners of the vessel or of the master or of some person directly connected with the vessel and its management, which would be sufficient to make the vessel itself in rem chargeable with being negligent. In this case, the vessel itself being a person and being the defendant is specifically charged with negligence.

The proper tool for removing the scale and which has been in existence for at least twenty years is a rapidly revolving series of cutters which are driven by power. Such a machine would go rapidly through the tubes.

This tool has been in existence for about 20 years and has always been used to clean the scale from water tube boilers in order to save time. Mr. Bulger testified that the turbine cutter only came into existence about two years ago, and that is about the time of this accident. His testimony as an expert by such an answer was misleading, because the tool referred to has been in existence for about twenty years, being driven by a flexible shaft in the same manner as a dentist's drill, or one of the little massaging implements used in barber shops; this flexible shaft being connected either to a small motor, or engine standing near the boiler.

About two years ago an improvement was made upon this apparatus whereby the motive power was furnished for the small cutters by a small turbine on the end of a piece of pipe. The water flowed through the pipe, operating the turbine and washing the scale away all at the same time.

The fact that an improvement had been made upon the proper style of cleaning machine did not signify that a proper cleaning machine was not in existence before the improvement on it was invented and put on the market. However, this cutting machine was not essential to cleaning the tubes, but it was essential to speed in cleaning the tubes. A tool furnished by the makers of the boiler made out of hard steel exactly the same diameter as the tube, would remove all the scale, but it would do so very slowly and would require, if the tube was at all in bad condition or dirty, from one half an hour to an hour for each tube.

It is contended that the negligence in this case is due to the fact that the company did not allow sufficient time to clean the tubes properly, with the tool provided by the makers of the boiler and too parsimonious to purchase a tool that would clean the tubes rapidly; the tool used by the chief engineer of the vessel was not intended to remove scale at all, and would not remove scale according to his own testimony. It was what is known as a sponge or brush for cleaning the tubes of Scotch or tubular boilers. In those types of boilers the water is on the outside of the tube and the smoke and gases pass through the tube, leaving a deposit of soot inside the tubes. The common term of engineers is "sponge the tubes" and to do this a tool similar to the tool testified to having been used in cleaning this boiler, is used; but the only substance to be removed in that case is the soft soot

and, even then, it is a very common occurrence that such a tool will not pass through the tube, but will merely force the soot ahead until it blocks or stops up the tube and there is then another tool arranged like an auger, which is used to drill through soft soot and again open up the tube.

In such types of boilers these stoppages of a tube have the opposite effect to the stoppage of a tube in a water tube boiler; for, if a tube in a Scotch boiler or tubular boiler is stopped up, the flame will not go through the tube, and it being surrounded by water all the time, that tube remains cold, but in a water tube boiler the tube being surrounded by fire all the time, if there is an obstruction so that the water will not circulate through it, the tube becomes unduly heated and will burn. If there is absolutely no circulation, the tubes will burn completely out, and if there is merely defective circulation the tube will gradually burn thinner; that is the deterioration of the tube will progress more slowly.

The thickness of the tube and the defects arising from gradual burning of the tube, can only be seen by examining the tube from the outside. It is not contended that such an examination should be done frequently, but it is contended that it should be done at least once a year, even though the time necessary to take down the casing of the boiler may occupy a few days.

That the United States inspectors, as testified by Mr. Bulger, are satisfied by cutting out and removing a few tubes, examining them and assuming that the others are in equally good or bad condition is no excuse for failure to make proper examination of the tubes on the part of the shipowners.

The United States inspectors are not always perfect, and they have several times received a severe checking up for negligent inspection of vessels, particularly the "Slocum" disaster. But it is not the intention of the Appellee in this suit to criticise any of the methods of the United States inspectors, but it is contended, that failure to properly examine not only the inside but the outside of these tubes and to test them for thickness, was negligence on the part of the owners and managers directly attributable to the vessel itself, in an action in rem.

The negligence consists in three things: (a) failure to provide a proper tool, if speed in cleaning was desired by the owners of the vessel; (b) failure to allow sufficient time to clean the boilers if they were relying on the scraper furnished by the makers of the boiler; (c) failure to examine the outside of the tubes to see whether they had become burnt and thin, and failure to become conversant with the general defective condition of the boilers due to all these conditions.

In other words, the view that such a defect in the boilers can be considered latent or hidden was in itself negligence.

Mr. Bulger testified not once, but many times, that the tube showed for itself, that it was burnt. Mr. Huff testified that if a tube became overheated and burst, all the water in the boiler would blow out through the rupture which would absolutely prevent any further burning of the tube. It is therefore ridiculous to contend that this tube may have been burnt after its rupture. The boiling water and steam poured out of both ends of the ruptured tube which would absolutely prevent any further burning.

It is further to be remembered that Mr. Bulger and Mr. Huff and Mr. Grundell were only called as experts. Mr. Bulger was prejudiced as an expert, because he had already formed an opinion, and in a written opinion had expressed his views that this was caused by a latent defect in the tube; it was therefore asking a great deal for an expert and especially a government officer, to reverse his own decision and declare himself to have been in error.

Mr. Huff admitted that he had had no practical experience in the running of water tube boilers and Mr. Grundell absolutely disclaimed the fact that he was an expert.

Judge Donworth, in his opinion, especially referred to the manner in which Mr. Bulger clung to the testimony on cross-examination, that the rupture of this tube was due to a latent defect. These experts, who should have been disinterested scientists helping the Court on a mere scientific question, showed that they were interested in claiming that this was a latent defect and were determined to stick obstinately to such an opinion in the face of their own admission, practically admitting that the evidence of the tube itself showed that it had been burnt.

His Honor, Judge Donworth, especially referred to this phase of the case in his opinion.

Small portions of the testimony supposed to be favorable to the Appellant are very freely quoted in his brief. Such portions, if read with the context, would frequently have an entirely different meaning to what they have when selected and standing alone.

The negligence claimed in this case is negligence attributed to the vessel itself as an actor and is on all fours with the case of "The Anaces," 93 Fed. Rep. 240-246.

The technical parts of the case may be better argued orally when exhibits themselves may be shown to the Court and explained. The facts of the cases cited by the Appellant, in the most part, have little or no bearing upon the question involved in this case.

The District Court awarded the Appellee $6,200 damages and his costs, and the fact that his Honor enumerated the manner in which he arrived at this conclusion as to the amount of damages is not in itself material or relevant, and, as expressed by his Honor, was only given for the purpose of showing the processes of his own mind in arriving at such an amount.

Great stress is placed upon the fact that Judge Donworth could not say which piece of tube was definitely referred to in the testimony. There was only one tube in evidence, although it had been cut into several pieces; hence, it was still one tube, and if any portion of it showed overheating, it showed that the tube had been overheated.

Appellant in his brief states that Mr. Bulger concluded this tube had been overheated, in that it was bent. That was nonsense. Mr. Bulger's competence as an expert is not questioned by the Appellee, and for Appellant to accuse its own expert of such rank incompetency as to judge the question of over-heating a tube by its physical shape, is ridiculous.

Any expert familiar with steel and iron can tell at a glance from the character of the very metal itself in whatever physical shape it may be, whether the substance has been burned or over-heated. Mr. Bulger said the tube shows for itself that it has been overheated. The only part of that tube which absolutely shows for itself that it has been over-heated is that portion in the vicinity of the rupture. It does not

require an expert to see at a glance that the tube in such portion thereof has been over-heated.

Taking up the assumption of Appellant on page 37 of his brief he says:

"Assuming, for the sake of argument, that the particular tube that had burst, had at one time been overheated, and as pointed out, this is not a fact, and was not proved, the Court had to then presume that the over-heating was caused by a want of circulation in the tube; and presume that the want of circulation in the tube was caused by an obstruction therein; and presume that this obstruction was scale which had not been removed from the tube; and then presume that the failure to remove the scale was due to the negligence of the officers of the Kilburn."

Where does this reasoning lead us? It leads us to this, that it was negligence to leave a tube, which had been burned thin, in the boiler. It was negligence to look through it with a candle and not seek to look at the outside diameter of the tube. It was negligence on the part of the owners not to properly examine the tubes and find the defect and remedy it.

Following the argument of Appellant, there is no negligence where a person willfully and intentionally neglects to look for defects common to arise in a water tube boiler, especially when it grows old.

The care required to find these defects takes time and money, but the company unwilling to spend time and money to find these defects and to look for them, certainly cannot hide behind its own negligence. They certainly cannot say "because we did not look for it, we didn't see it, and therefore we are not to blame." The very negligence depends upon the fact that they

did not look for it, and had they looked for it they would have found it.

The Appellee only received the Appellant's brief on the 10th of October and in order that there should be no delay in this case, his brief should be filed by the 17th. Such a time is too short to thoroughly and exhaustively cover this question, and the Appellee therefore relies, to cover all the other points, on his oral argument and does not wish it to be understood that anything unanswered in this brief is to be taken as admitted.

Respectfully submitted.

FRANKLIN P. BULL,
HENRY B. LISTER,
Proctors for Appellee.

No. 1894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY.

THE MARITIME INVESTMENT COMPANY (a corporation), claimant of the S. S. "F. A. Kilburn", a steam schooner,
Appellant,

vs.

BASILIOS HANOS,
Appellee.

PETITION FOR A REHEARING ON BEHALF OF APPELLANT.

SAMUEL ROSENHEIM,
H. W. HUTTON,
BERNARD SILVERSTEIN,
Attorneys for Appellant and Petitioner.

Filed this.....day of March, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 1894

IN THE

United States Circuit Court of Appeals

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Appellant,

vs.

BASILIOS HANOS,
Appellee.

PETITION FOR A REHEARING ON BEHALF OF APPELLANT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant herein respectfully petitions this Honorable Court for a rehearing in the above entitled matter, and respectfully submits that its petition for a rehearing be granted for the following reasons:

1st. Assuming that the evidence does show that the tube in question was overheated, there is absolutely no evidence of any kind to justify the conclusion that the overheating of this tube was caused by any blocking thereof with rust or dirt so as to impede the circulation of the water through the tube. We make this statement in view of the fact that your Honors in your opinion (page 4) state:

"He (Malikia) also testified that they tried to "clean *that* tube about four days before the explo- "sion at the dry dock of Boole & Sons' Ship Yard "at Oakland, California, and gave testimony tend- "ing to show that the tube was blocked with rust "or dirt and was not then in a safe condition."

We take it that your Honors make this statement believing that the particular tube that burst was identified by this witness as being the particular tube which he tried to clean and was unable to clean because it was filled or blocked up with rust and dirt.

We believe that we should, in this petition, point out to your Honors that the witness was a Greek; that he testified through an interpreter, and that he never intended his testimony to be construed as quoted. We consider the interpretation of this testimony to be vital, and so feel we are justified in pointing out to your Honors the testimony of this witness as it is contained on page 152 of the Apostles, which reads as follows:

" Q. How did you and the oiler and the engineer " clean *these tubes* at the time you referred to?

" A. First, I try with the brush and after try " with the sledge bar and hit it with the big hammer.

" Q. Why did you hit it with a hammer?

" A. Because the tubes were blocked up.

" Q. What were they blocked up with?

" A. Blocked up by dirt; the bar could not get " through inside.

" Q. *Do you remember if this particular tube* " that broke was one of those that was so blocked " up that you could not get the bar through?

" A. Do not remember because they were all " blocked up."

It must seem evident from this testimony that the witness never intended to say that the particular tube in question was identified by him as being one of the tubes which he says was so blocked up that he could not get a bar through. He said he did not remember. The reason expressed for his not remembering cannot be seriously considered, and finds absolutely no confirmance in any other testimony. No such condition ever existed, and was not proved.

As a matter of fact, the witness' statement that of the 300 tubes, 250 were so blocked up by dirt that he could not get a tube through them, is so apparently erroneous that we hardly thought the Court would seriously consider this testimony. If it were true that of the 300 small tubes, 250 were so blocked up as to impede the free circulation of water, it would

have been impossible for the steamer to have plied the waters as the boilers would not have performed their proper functions. This is all the more apparent when considered in conjunction with the actual appearance of the tube itself (Exhibit No. 7) which even to an inexperienced eye would show that there never was such an accumulation of dirt or rust in that tube as to have impeded the free circulation of water therein. The tube is in the same condition that it was in after the explosion. If scale or dirt or rust had so accumulated within the tube as to stop the free circulation of water therein, it would have the appearance similar to that of one of the exhibits introduced, which shows what is meant when it is said that an accumulation impedes the free circulation of water.

We are aware, of course, that we cannot upon this petition go into detail in the quoting of testimony, and we feel, therefore, that if your Honors have determined this question as to the condition of the tube solely upon the testimony of the witness Malikia, which the opinion suggests, that upon a rehearing being granted we will be able to point out from the record the utter unreliability of this testimony, and that the contradictions therein are so patent and the statements therein so at variance with the other testimony of the respondent, that it should be given little, if any, credence, in the determination of the facts of this case.

2nd. With reference to the question of laches, your Honors state in your opinion (pages 4 and 5) that:

"The record contains no evidence to support the "plea of laches set up in the answer, and in the "opinion of the trial Court it is stated that that "defense was not referred to by the claimant's "counsel in argument."

We feel, in view of this statement made by your Honors, that we have been misunderstood with reference thereto. It is true that no testimony was introduced by us outside of the record itself for the purpose of showing laches on the part of the libelant. Our interpretation of the rule is such, that we did not feel that the burden of proof was upon us to show laches for this reason. The record itself shows that the explosion happened on the 19th day of January, 1908. The record further shows that the libel was filed on September 29, 1909, a matter of one year and seven months after the date of the accident. The statutory period provided for in this State within which an action for damages for personal injuries can be brought, is one year from the date of the accident (C. C. P., Sec. 340).

With these facts and the law before us, we hold that laches will be presumed and that the burden of proving that there was no laches, then rests upon the libelant, and he having failed to submit such proof, that the record as it stands presumes laches. In other words, we hold this to be the rule, that

where the action is brought within the statutory period provided for by the State statute wherein the accident occurred, that then the burden of proving laches rests upon the defendant in the case, and no laches will be presumed; if, on the other hand, the action is brought at a date later than that provided for by the statutes of the State, then laches will be presumed and the burden rests upon the libelant or plaintiff to show that there was no laches upon his part in bringing his action after the date provided for in the statute.

If this rule be correct, we submit that it was not incumbent upon us to introduce any testimony affirmatively showing the libelant to be guilty of laches in the premises, and we therefore respectfully submit that we did not abandon our defense of laches.

3rd. We desire also to call your Honors' attention to the fact that no mention was made by this Court in its opinion concerning our defense of contributory negligence and defense of fellow servant contained on pages 39, 40 and 41 of our brief.

The testimony shows that the libelant himself was engaged in cleaning these very tubes at Boole's ship yard before the explosion. We believe that if our petition for rehearing is granted, that we will be able to convince your Honors that if such an accumulation of dirt as is claimed existed in this tube so as to prevent the free circulation of water, that it was the negligence of the libelant himself and the

negligence of his fellow servants in failing to properly clean the tubes. We believe that we will be able to show from the testimony that the officers of the vessel did what was incumbent upon them to do in ordering the tubes to be cleaned; they could not personally do this work, and it necessarily devolved upon the firemen and oilers to clean these tubes. As your Honors made no comment at all upon this phase of the controversy, we feel that it was not brought to your notice with sufficient force. We have abundant authority to submit to your Honors which will show that under circumstances of this kind, the contributory negligence of the person injured would be a bar to his recovery.

4th. We desire also to submit that your Honors made no comment in your opinion with reference to the matter contained on pages 42, 43 and 44 of our brief concerning the amount of damages allowed by the trial Court. While we are aware that the appellate Court will not ordinarily disturb the estimate of damage found by the Court below, we feel that under the peculiar circumstances of this case, that more than ordinary consideration should be given to our suggestion that if the libelant is at all entitled to any damage, it should not exceed the sum named by us on page 45 of our brief, to wit, the sum of $2594.00.

The circumstances referred to are, that the judge rendering the decision was not the judge who heard the testimony; that while, as Judge Dunworth stated

in his opinion, the libelant exhibited to him his hands upon the hearing had at that time, we were not, nor had we the opportunity of counteracting the influence that such an exhibition must have had upon the judge, who had nothing but the cold printed record before him and the exhibition so made wherewith to make his determination.

For the foregoing reasons, we respectfully submit that our petition be granted.

SAMUEL ROSENHEIM,
H. W. HUTTON,
BERNARD SILVERSTEIN,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF ATTORNEY.

I, one of the attorneys for appellant and petitioner, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and further, that said petition is not interposed for delay.

BERNARD SILVERSTEIN,
Attorney for Appellant and Petitioner.

No. 1902

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

IN THE MATTER OF THE ARGONAUT SHOE COMPANY, Bankrupt.

W. E. PRIESTLY, Petitioner,

vs.

HILLIARD & TABOR AND WILLIAMS MARVIN CO., Respondents.

Petition for Revision Under Section 24b of the Bankruptcy Act of July 1, 1898, of a Certain Order of the District Court of the United States for the Northern District of California.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

No. 1902

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FOR THE NINTH CIRCUIT.

THE MATTER OF THE ARGONAUT SHOE COMPANY, Bankrupt.

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vs.

ILLIARD & TABOR AND WILLIAMS MARVIN CO., Respondents.

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FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Petition for Revision.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Judicial Circuit:

The Petition of W. E. Priestly respectfully shows:

That on May 21st, A. D. 1910, a Petition was duly filed in the United States District Court, for the Northern District of California, praying that said Argonaut Shoe Company be adjudged an involuntary bankrupt, and on June 3d, A. D. 1910, it was adjudicated a bankrupt, and on June 21st, A. D. 1910, F. S. Howell was duly elected and qualified as the trustee of said bankrupt.

During the course of the administration of the estate of said bankrupt, Helen M. Townsend presented her claim against the estate of said bankrupt for $9,170.81, and thereafter proceedings were had in regard to said claim, as are particularly set forth in the report of Armand B. Kreft, the Referee to whom said matter was assigned, which said report was made to the United States District Court, for the Northern District of California, a certified copy of which said report is attached hereto, marked Exhibit "B," and hereby specially referred to, and by such reference is made a part of this Petition.

Upon said Referee, on September 8th, A. D. 1910, making his order directing the payment of the dividend upon said claim to W. E. Priestly, respondents herein duly filed with said Referee their Petition to have said order reviewed by said United States District Court, a duly certified copy of which

said Petition is attached hereto, marked Exhibit "A," and hereby specially referred to and by such reference is made a part of this Petition.

Thereafter said Petition came on regularly for hearing before said District Court, Hon. John J. De Haven, Judge thereof, presiding, and on September 19th, A. D. 1910, said District Court made and entered its order herein, a certified copy of which said order is attached hereto, marked Exhibit "C," and hereby specially referred to and by such reference is made a part of this Petition.

Wherefore, your petitioner prays that the order of the United States District Court made and entered herein on September 19th, A. D. 1910, be reversed, and that this Honorable Court make its order herein affirming the decision of said Referee, and directing that all dividends heretofore declared and unpaid and all dividends hereafter to be declared upon said claim of Helen M. Townsend be paid to your petitioner, and for such other relief as may be meet and just.

FABIUS T. FINCH,
L. S. MELSTED,
Attorneys for Petitioner.

State of California,
City and County of San Francisco,—ss.

L. S. Melsted, being first duly sworn, deposes and says: That he is one of the attorneys for petitioner herein; that he has read the foregoing Petition for Revision and Review and knows the contents thereof, the same is true of his own knowledge; this affidavit is made by affiant and not by petitioner for

the reason that petitioner at present is in and resides in El Dorado County, California, and not in the City and County of San Francisco, where both of his attorneys reside and have their offices.

L. S. MELSTED.

Subscribed and sworn to before me this 23d day of September, 1910.

[Seal] A. J. HENRY,

Notary Public, in and for the City and County of San Francisco, State of California.

Exhibit "A."

In the District Court of the United States, in and for the Northern District of California.

No. 6593.

In the Matter of ARGONAUT SHOE CO.,

Bankrupt.

Petition of Hilliard & Tabor, and Williams Marvin Co. for Review of Referee's Order.

Petitioners are creditors of the above-named bankrupt, and as such were parties to the following certain proceedings in said bankruptcy, pending before Armand B. Kreft, Esq., as the Referee in Bankruptcy, in charge thereof, to wit:

Petitioners garnished dividends in the hands of Fred S. Howell, trustee in the above-entitled matter belonging to Helen M. Townsend, one of the creditors of the above-named bankrupt, and the question presented to the Referee was, whether or not dividends in the hands of a trustee in bankruptcy could be garnished.

Upon the hearing thereof, a final order was made by the said referee, as follows, to wit, that Fred S. Howell be directed and instructed to forthwith pay to W. E. Priestly, assignee of Helen M. Townsend, or to L. S. Melsted, his attorney, any and all dividends or other moneys due or owing to him by virtue of said claim of Helen M. Townsend.

To which order petitioners duly excepted.

Said order is erroneous in this, that said order is against law, in that it holds that dividends in the hands of a trustee belonging to a creditor of the bankrupt may not be garnished.

Wherefore, petitioners pray that said order be reviewed and reversed, and that they be restored to all things they have lost by reason of said error.

Dated September 12th, 1910.

HILLIARD & TABOR,
By HENRY A. JACOBS,
Their Attorney.
WILLIAMS MARVIN CO.,
J. F. PETERS,
Vice-Pres.

HENRY A. JACOBS,
Attorney for Petitioners.

[Endorsed]: Filed 12th day of Sept., 1910. 12:20 o'clock P. M. A. B. Kreft, Referee in Bankruptcy in and for the City and County of San Francisco.

Exhibit "B."

[Report of Referee in Bankruptcy.]

In the District Court of the United States, for the Northern District of California.

No. 6593—IN BANKRUPTCY.

In the Matter of ARGONAUT SHOE COMPANY, Bankrupt.

To the Honorable, the Judges of the District Court of the United States, for the Northern District of California:

I, Armand B. Kreft, one of the Referees in Bankruptcy of the above-entitled court, do respectfully certify:

That in the course of the proceedings in said matter before me the following question arose pertinent to said proceedings.

On the 9th day of August, 1910, a dividend of 13 per cent was declared herein on all allowed claims, and on the 13th day of August, 1910, I signed and filed a dividend sheet herein which showed a claim of Helen M. Townsend as allowed in the sum of $9,170.81, and the dividend payable thereon as $1,-192.20.

On Aug. 12, 1910, an assignment of said claim to W. E. Priestly was filed. A waiver of notice of the filing of such assignment executed by the assignor was filed on September 7th, 1910, and on September 8th, 1910, an order was made subrogating said W. E. Priestly to the rights of said Helen M. Townsend as to said claim.

After the declaration of the dividend aforesaid a notice of garnishment was served on Fred S. Howell, trustee herein, in an action brought in the State court by certain alleged creditors of said Helen M. Townsend.

On August 30th, L. S. Melsted, Esq., Attorney for W. E. Priestly, made application to me for an order directing the trustee to pay said dividend to said W. E. Priestly. At said time Henry Jacobs, Esq., appeared for the attaching creditors, Hilliard & Tabor and Williams Marvin Co. The trustee and his attorney were also present.

It was claimed by W. E. Priestly that the assignment to him was made before the garnishment was served on the trustee, while the attaching creditors claimed the garnishment was served on the trustee prior to the assignment. The referee stated that he did not deem it necessary to enter upon an inquiry as to this question of fact, as in his opinion a dividend in the hands of the trustee could not be reached by attachment out of the State court. Counsel for the attaching creditors desired to present authorities on this point and this question was submitted on briefs.

On September 8th, the referee made an order directing the trustee to pay the dividend to W. E. Priestly, to which order said attaching creditors have filed a petition for review, said petition being filed on September 12th.

I have been unable to find any decision under the present Bankruptcy Act upon the point presented. The rule under the Act of 1867 was well established

that dividends in the hands of the assignee could not be attached by process out of a State court.

In Re Cunningham (19 N. B. R. 276, Fed. Cases, 3478), the Court says:

"It is well settled that money or property *in custodia legis* cannot be reached by garnishment or execution in the absence of statutory authority. * * * The reason for this doctrine seems to be that the Court having the money or property in its custody under the law holds it for some purpose, of which that Court is the exclusive judge. To permit property or money thus held to be seized on execution, attached or garnished, would, therefore, defeat the very purpose for which it is held, and in many cases, enable some other court to dispose of property or money, and wholly devest it of the end or purpose for which possession has been taken. A conflict of jurisdiction and decision would, in many cases, thus ensue. * * * The true doctrine is that, when property or money is *in custodia legis* the officer holding it is the mere hand of the court, his possession is the possession of the court, to interfere with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the judgments and orders of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied."

In the case of Gilbert vs. Quimby (1 Fed. Rep. 111), it was held that dividends in the hands of the assignee were not attachable, on the ground that the dividend did not become the property of the debtor until it was paid to him.

Counsel for the attaching creditors refers to the case of Dunsmoor vs. Furstenfeldt, 88 Cal. 522, as strongly supporting his contention that after a dividend is ordered paid an attachment will lie. This case holds that after the Court has ordered a certain distributive share of a fund to be paid to a particular person, it may be attached by a creditor of the party so entitled, on the ground that the reason for the rule that property *in custodia legis* cannot be attached, viz., that an attachment would embarrass judicial and other official proceedings in the administration of such property,—ceases to exist after an order of payment has been made by the court.

The rule in the federal courts appears to be to the contrary, and as this question concerns a matter of procedure in the administration of funds in the custody of the court, the law of the forum obtains over the rule of the State court.

It is the object of the bankruptcy law that estates be administered as expeditiously as possible. Two principal officers are concerned in the administration —the referee and the trustee. Moneys of the estate in the hands of the trustee are at all times *in custodia legis.* A controversy between a creditor of the bankrupt and the creditors of such creditor is entirely foreign to the bankruptcy proceeding. It will be seen that the closing of estates might be indefinitely postponed if the trustee may be directed to hold funds of the estate until such controversies are determined by other courts. The only way, suggested by the federal decisions, by which a dividend can be reached by a creditor of a creditor of the

bankrupt is by the appointment of a receiver in the State court proceeding, who may make application to the Bankruptcy Court for the payment to him of the dividend.

Respectfully submitted,
ARMAND B. KREFT,
Referee in Bankruptcy.

September 16, 1910.

[Endorsed]: Filed at 9 o'clock and 10 min. A. M. Sept. 19, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Exhibit "C."

[Order Reversing Order of Referee in Bankruptcy, etc.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 19th day of September, A. D. 1910. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 6593.

In the Matter of the ARGONAUT SHOE COMPANY,

In Bankruptcy.

The Petition for the Review of the Order of the Referee made herein on September 8, 1910, directing the trustee to pay to W. E. Priestly, assignee of Helen M. Townsend, dividend owing by virtue of the claim of Helen M. Townsend herein, this day came

on for hearing, on motion of H. L. Green, Esq., for attorney for petitioner, no objection being made thereto, by the Court ordered that said Petition be, and the same is hereby, submitted to the Court for decision on the certificate of the Referee filed herein on Sept. 19, 1910, and the briefs filed before the Referee:

After due consideration had thereon, now here by the Court ordered that the said order of the Referee be, and the same is hereby reversed, with directions to said Referee to ascertain which was prior, the assignment or the writ of attachment referred to in the certificate of the Referee, and after such determination that said Referee proceed to direct the trustee herein to pay the dividend to the party who is shown to be entitled thereto.

Certificate of Clerk U. S. District Court to Exhibits on Petition for Revision.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify the foregoing to be full, true and correct copies of the Petition of Hilliard & Tabor and Williams Marvin Co. for Review of Referee's Order, filed September 12th, 1910, at 12:20 o'clock P. M., by Armand B. Kreft, Referee, and by him transmitted to this office, and Certificate and Return of said Referee on said Petition, and Order of said District Court made thereon, in the Matter of the Argonaut Shoe Co., Bankrupt, No. 6593, now remaining on file and of record in this office.

Attest my hand and seal of said District Court this 24th day of September, A. D. 1910.

[Seal] JAS. P. BROWN,
Clerk.
By Francis Krull,
Deputy Clerk.

[Endorsed]: No. 1902. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of The Argonaut Shoe Company, Bankrupt. W. E. Priestly, Petitioner, vs. Hilliard & Tabor, and Williams Marvin Co., Respondents. Petition for Revision Under Section 24b of the Bankruptcy Act of July 1, 1898, of a Certain Order of the District Court of the United States for the Northern District of California.

Filed September 24, 1910.

F. D. MONCKTON,
Clerk.

[Notice of Filing of Petition for Revision.]

In the United States Circuit Court of Appeals, for the Ninth Circuit.

In the Matter of ARGONAUT SHOE CO.,
Bankrupt.

W. E. PRIESTLY,
Petitioner,

vs.

HILLIARD & TABOR and WILLIAMS MARVIN CO.,
Respondents.

To the Respondents Above Named and to Henry A. Jacobs, Esq., Their Attorney:

You are hereby notified that on September 24th, 1910, I filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a Petition for Review of the Order made by the United States District Court for the Northern District of California, on September 19, 1910, in the Matter of the Argonaut Shoe Co., bankrupt, a copy of which Petition is attached hereto and made a part of this notice. I shall ask to have the cause docketed and the necessary orders made therein to have such cause set down for hearing.

Dated September 24th, 1910.

FABIUS T. FINCH,
Attorney for Petitioner.

Received a copy of the above Notice, together with a copy of said Petition for Review, this 24th day of September, 1910.

HENRY A. JACOBS,
Attorney for Respondents.

[Endorsed]: No. 1902. U. S. Circuit Court of Appeals, Ninth Circuit. In the Matter of Argonaut Shoe Co., Bankrupt. W. E. Priestly, Petitioner, vs. Hilliard & Tabor and Williams Marvin Co., Respondents. Notice of Filing Petition for Revision. Filed Sep. 26, 1910. F. D. Monckton, Clerk.

No. 1902

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of the ARGONAUT SHOE COMPANY, Bankrupt.

W. E. PRIESTLY,

Petitioner,

vs.

HILLIARD & TABOR and WILLIAMS MARVIN CO.,

Respondents.

PETITIONER'S BRIEF.

FABIUS T. FINCH,
Attorney for Petitioner.

No. 1902.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the ARGONAUT SHOE COMPANY, Bankrupt.

W. E. PRIESTLY,

Petitioner,

vs.

HILLIARD & TABOR and WILLIAMS MARVIN CO.,

Respondents.

PETITIONER'S BRIEF.

This is a Petition under section 24b of the Bankruptcy Act of 1898 to Review an Order of the District Court of the United States for the Northern District of California. The facts are these: The Argonaut Shoe Company was adjudged an involuntary bankrupt and Helen M. Townsend proved her claim against the bankrupt for $9,170.81. Thereafter she, in good faith and for a valuable consideration, assigned her claim to W. E. Priestly, the petitioner herein. A dividend was declared upon the claims against the bankrupt and the proportion due upon the Townsend claim is $1,192.20. After the dividend had been declared the respondents sued Mrs. Townsend in the State courts and caused a garnishment to be levied upon F. S. Howell, the Trustee of the Bankrupt. Petitioner Priestly moved the Referee for an order directing the trustee to pay the dividend to himself (Priestly) and respondents contested this

application, contending that the dividends should be held in the hands of the trustee pending the determination of the suit in the State court against Mrs. Townsend, and if respondents were successful in the State court, that the trustee be ordered to pay the amount of the dividend to them. The Referee made the order directing the trustee to pay the dividend to Priestly and respondents petitioned the District Court to review the order of the Referee. The District Judge reversed the order of the Referee and directed the Referee to ascertain which was previous in point of time, the assignment to said Priestly or the garnishment issued out of the State court at the instance of respondents. This is the order which petitioner asks to have reviewed here. The testimony taken before the Referee did not disclose which was first in time; the contention of petitioner being that it is immaterial, and the Referee upheld our contention. Petitioner insists that the dividend in the hands of the trustee remains *in custodia legis* until it is actually paid out to the creditor of the bankrupt or to the creditor's assignee and that a garnishment will not lie out of the State court to interfere with any of the acts of the trustee or to impound any dividend in his hands.

The policy of the bankruptcy law is to speedily administer upon the estates of bankrupts, and for that purpose Congress has designated two principal officers (the Referee and the trustee), and has charged them with such administration. That prompt settlement of the estates is one of the cardinal principles of the Bankruptcy Act is evident from

its entire context, and if dividends in the hands of the trustee were to be thus interfered with, the orderly administration of estates would be impaired. By § 65, par. b of the Act, it is provided that the first dividend shall be declared within thirty days after adjudication, if possible, and by § 47, par. a, sub. 9, in mandatory terms the Act says the trustee must "Pay dividends within ten days after they are declared by the Referee." It is impossible for the trustee to obey this mandate of the Act if the State courts are permitted to tie his hands; again by § 40, par. a, and § 48, par. a, the Referee and trustee are not permitted to receive compensation for their services until the estate is finally settled and their administration of it completed. This might be delayed without limit if the State courts were permitted to prevent the trustee from disbursing the moneys in his hands.

This exact question has been passed upon in a number of cases under the Bankruptcy Act of 1867, which in all respects material to this case is similar to the present statute.

The law in this case has been well settled, and the reason for the ruling of the different Federal Courts so well set out and explained in Re Chisholm, 4 Fed. Rep. 526, that we feel that the incorporation of that case in this brief will settle the question as to petitioner's rights in this matter. In re Chisholm is identical with the case at bar. An assignment had been made by the creditor under the bankruptcy proceedings, and the assignee moved for an order directing the payment to him of any and all funds

under such assignment. Following is the opinion in that case:

"This is an application for an order on the Assignee to pay a dividend to petitioner, who, by order duly made, has been subrogated to the rights of a creditor, whose debt has been, after contest, established as proved. The answer of the Assignee shows that before the dividend was actually declared, but after the meeting at which it was declared was called, he was served with a warrant of attachment against the original creditor, issued by a State Court in an action against that creditor by the Planter's National Bank of Augusta, Georgia, upon a judgment recovered in the Circuit Court of the United States for the District of South Carolina. The Assignee declined to pay the dividend to the petitioner without a special order of the Court. In the case of Kohlsaat, 18 N. B. R. 570, it was held that the payment of moneys, payable under a composition in bankruptcy could not be interfered with by proceedings in a State Court. In the case of Cunningham, 19 N. B. R. 276, the question whether dividends in the hands of an Assignee can be attached was very carefully examined by Judge Love, and it was *held that they could not be attached even after the dividend was declared.* The case of Dunlap v. Insurance Co., 74 N. Y. 145, seems not inconsistent with these cases. The petitioner is entitled to an order on the ground that

the money in the hands of the assignee could not be reached by attachment. Motion granted."

The reason why such an attachment cannot lie was pointed out by the Court in the matter of Gilbert vs. Quimby, 1 Fed. Rep. 111, where the Court says on page 113:

"That the dividend was *not attachable* on process from the State Courts would seem to be quite clear. While in the hands of the Assignee it would be a part of the estate of the bankrupt in custody of the Court. It would not be held the property of the debtor, but would only be property that would become his when he should get it. He could not maintain any suit against the Assignee for it, nor obtain it by any legal process other than by application to the District Court having control of the fund as a party to the proceedings in that Court. Money in the hands of a disbursing officer of the United States, due to a private person, cannot be attached on process against such person out of a state court, because the money will not be his, but will remain the property of the United States until it is paid to him. Buchanan vs. Alexander, 4 How. 20. Neither can any fund be so attached that it is so situated that the debtor in the process is not entitled to sue for and recover it. McLaughlin vs. Swann, 18 How. 217, Gassett vs. Groutt, 4 Met. 486-488. *These reasons are applicable to a dividend in the hands of an assignee.* Colby vs. Coates, 6 Cush. 558; Cappel vs. Smith, 47 R. 312, and

Grant vs. Harding, in note. In re Bridgman, 2 N. B. Reg. 252."

Under the Act of 1867, the officer whose duties corresponded to the present Trustee was called an Assignee. The decisions under the Act of 1867 are reported in the National Bankruptcy Register.

The Court further says on page 113:

"The order of the District Court would be that the dividend be paid to Alden Adams (the creditor of the Bankrupt), and there would not appear to be any tenable ground on which any other Court or officer could order it paid to anyone else, or order that payment to another should be payment to him, or answer the effect of the order. * * * Payment of the dividend to them (the attaching creditors of the Bankrupt's creditor) by the Assignee on such process would be no more than payment to them or anyone else without process, and he would remain subject to the order to pay to Alden Adams the same as before, and no interposition through this Court would make his liability any greater or different."

See, also, In re Cunningham, 19 National Bankruptcy Register, 276; Federal Cases, 3478, quoted by the Referee in this case at page 7 of the Petition for Review.

The contention of the respondents, as shown by the Report of the Referee, is that after the dividend has been declared it is no longer *in custodia legis,* but that the trustee holds it merely as a disbursing officer, and that it is then subject to garnishment in

accordance with the comity existing between the State and the Federal jurisdictions. This contention has been expressly refuted in the case of

Clark vs. Shaw, 28 Fed. 356,

where the Court say:

"It is held by the highest Courts of the State that money collected by a Sheriff on execution may be attached by such trustee process (citing case). It is argued with plausibility in behalf of the plaintiff, that this proceeding rests on a Statute of the State, and that the construction of the Statute by the highest Court of the State should govern. This argument is well-founded, so far as proceedings rest upon a Statute of the State; but this money is held by the trustee as Marshal under and by virtue of the laws and authority of the United States. The manner of the holding is to be determined upon those laws and the effect of the proceedings under them, which have resulted in the collection of the money by the Marshal. The question is whether the money when collected is so held by the Marshal as to come within the Statute of the State. It is not claimed or doubted but that a Marshal holding specific property in his hands by virtue of the process of a Court, so holds it that it cannot be interfered with by any other officer or process (citing cases).

"It is argued that this does not apply to money collected on execution. But the Marshal is subject to the control of the Court as to any property or money in his hands by virtue of the

process of the Court, so long as he holds it, to be exercised on behalf of any party interested in it on proper proceedings instituted for that purpose, to prevent abuse or perversion of the process, and to insure due execution of it (citing cases). This control would be lost if he could be compelled to take the property or money before any other Court, and submit it to judgment there. Money so held by him under the control of the Court is not entrusted or deposited with him, or in his hands, within the meaning of the Statute. It is still in the custody of the law. It is not subject to attachment any more than money in the hands of a disbursing officer of the Government, to be paid over to an employee would be (Buchanan vs. Alexander, 4 How. 20), or dividends in the hands of an Assignee in Bankruptcy for a creditor would be. (Gilbert vs. Lynch, 1 Fed. 111.)"

We respectfully submit that the dividend in question was held by the trustee as an agent and officer of the Court, and that the money was *in custodia legis*, and, therefore, not subject to garnishment.

It is, therefore, immaterial whether the assignment was made or the garnishment levied first, and the decision of the Referee should be affirmed and the decision of the District Court reversed.

Respectfully Submitted,

FABIUS T. FINCH,

Attorney for Petitioner.

No. 1902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the
ARGONAUT SHOE COMPANY,
Bankrupt.

W. E. PRIESTLY,
Petitioner,

vs.

HILLIARD & TABOR and WILLIAMS MARVIN COMPANY,
Respondents.

BRIEF FOR RESPONDENTS.

HENRY A. JACOBS,
G. B. BLANCKENBURG,
Attorneys for Respondents.

Filed this.....day of March, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 1902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the
ARGONAUT SHOE COMPANY,
Bankrupt.

W. E. PRIESTLY,
Petitioner,

vs.

HILLIARD & TABOR and WILLIAMS MARVIN COMPANY,
Respondents.

BRIEF FOR RESPONDENTS.

The facts in this case as stated in petitioner's brief are not controverted by the respondents, and we will therefore proceed to a statement of the authorities in support of respondents' position.

The precise question in this case is, can the funds in the hands of a trustee in bankruptcy for the benefit of a creditor of the bankrupt estate be reached by garnishment proceedings after a dividend had

been declared. Respondents wish to call special attention to the fact that garnishment in this matter was not levied until after a dividend had been declared. Petitioner in his brief cites a number of cases, all of which were decided during the year of 1867. None of these cases are in point as the writ of garnishment was served upon the Trustee prior to the order allowing the account and providing for the payment of dividends. It is unquestionably a well established rule that money or property in custodia legis cannot be reached by garnishment or attachment, but our State Courts have repeatedly made a distinction between money deposited with Trustees or Officers of the Court to be held awaiting the determination, or action of the Court, and moneys in the hands of said Trustees or Officers of the Court, of which the Court has already ordered distribution.

The rule in this State is well established that when an order is made by the Court directing the payment of such funds, the Court immediately loses jurisdiction of this particular fund, and the person to whom the money is due has a right upon failure of the Trustee or Officer of the Court to pay this money, to proceed and enforce collection thereof, the fund by operation of law immediately vesting in the parties, who become legally entitled thereto.

See Dunsmoor v. Furstenfeldt, 88 Cal. 522.

This case firmly establishes the California rule.

Mr. Justice Sanderson, in the matter of the Estate of Nerac, 35 Cal. 397, says:

> "It may be conceded that prior to a decree of distribution the money in the hands of an administrator cannot be reached by attachment or execution against the creditors—but we do not consider that the rule in question holds good after the decree of distribution has been made. By the decree each share is finally and definitely ascertained, and a cause of action thereafter exists against the administrator in favor of the distributee, and we are unable to perceive why—the money thus judicially determined to be due—to the distributee should not be within the reach of the creditors of the latter."

The same doctrine laid down by the Courts of the State of California, is followed in a number of Courts in other jurisdictions, and is supported by a number of eminent text writers.

Shinn on "Attachment and Garnishment", Section 531, p. 907, Vol. 2, says:

> "The creditor has no better claim to the fund or property than the beneficiary has, and when the latter has no right to maintain an action for it or any part of it, garnishment against the trustee will be unavailing. When, however, the beneficiary has a right of action at law against the trustee on the contract relation because of a fund being due and unpaid, the trustee may also be held as a garnishee in a suit brought against the Cestui Que trust."

The following are a few of numerous decisions of other jurisdictions in support of our contention:

Williams v. Jones, 38 Md. 555;

Mattingly v. Grimes, 48 Md. 102;

Saunders v. Robinson, 144 Mass. 306;

Fenton v. Fisher, 106 Pa. St. 418;

Felch v. Eau Pleine L. Co., 58 Wis. 431.

"When the trustee has performed the trust with the exception of passing over the balance to whom it belongs, he may be held liable in garnishment."

Van Reswick v. Lamon, 2 Mac Arthur (D. C.) 172.

"When his accounts have been audited and ratified, the amount belonging to the debtor ascertained and ordered paid directing the trustee to pay it over, which he has not done, he may be held as a garnishee by a creditor of the person entitled thereto."

Williams v. Jones, 38 Md. 555.

"When a trust fund or property is delivered to a trustee for the purpose of paying the general indebtedness of the grantor, then such trustee may be made garnishee at suit of a general creditor."

Arnold v. Elwell, 13 Me. 261;

Sanford v. Bliss, 12 Pic. 116;

Parker v. Knisman, 8 Mass. 486;

First Natl. Bk. v. Brainerd, 28 Fed. Rep. 917.

The cases of

Husted v. Stone, 69 Vt. 149;

Sapp v. McArdle, 41 Ga. 628,

are also in point.

It has been held by the Federal Court in the case of St. Albans Foundry Co. v. U. S., Dis. of Vt., 1900, 4 A. B. R. 594, that a trustee in bankruptcy

> "could be held to respond under the direction of the bankruptcy Court with such disclosure as is practicable."

It appears that in this case a bankrupt was garnished in a suit against one of his credtiors prior to the bankruptcy, and the Court held the garnishment upon the bankrupt to be binding upon the trustee in bankruptcy.

Quoting from the case of

McLaughlin v. Swann, 18 How. 217:

> "The attachment law of Maryland allows an attachment by way of execution to be issued upon a judgment and levied upon the credits (inter alia) of the defendant. Where an attachment of this nature was laid in the hands of garnishees who were trustees, and it appeared that after performing the trust there was a balance in their hands due to the defendant, the attachment will bind this balance. The defendant might have brought an action to recover it and wherever he can do this, the fund is liable to be attached."

In reference to this point see also

Logan v. Goodwin, 104 Fed. 490.

Petitioner in his brief maintains that the dividends in the hands of a Trustee in bankruptcy are in custodia legis. Respondents maintain, however, that after the Trustee has filed his report and the same has been approved and allowed, and a dividend declared which awaits disbursement, that the fund thus ordered paid is no longer in custodia legis, as it has been definitely set aside and ordered paid to the creditors, and awaits simply the final act of paying over. If the Trustee after an order declaring a dividend refused to pay over the same, there is no question but that the creditor could enforce payment thereof by the Trustee. His claim has been allowed, and a dividend ordered paid, and the money is to all intents and purposes his, for which he can enforce its payment by obtaining an order of the Court, which, if disobeyed by the Trustee, would put the latter in contempt.

The cases quoted by petitioner all fall under the old bankruptcy act. The amendment of 1910 of the Bankruptcy Act, Section 47, Subdivision 2, more particularly than heretofore, defines the duties of Trustees.

Petitioner in his brief points out that the closing up of a bankrupt estate might be indefinitely delayed by permitting State process to interfere. We submit however, that money garnished can be deposited in State Courts, awaiting adjudication of the State action, without interfering in any way with the administration of the bankrupt estate.

Our Federal Statutes (Revised Statutes 914, 915 and 916) provide laws that govern in the matter of garnishment and attachment proceedings wherein the United States is a party, and the rule appears to be that where the proceedings are between parties resident within a particular jurisdiction that the laws of the State wherein they are resident should govern.

Rose's Code of Federal Procedure, Subdivision "E" of Section 905, Volume 1,

says:

> "There are special federal provisions regarding garnishment in suits by the United States, but in other respects local laws as to garnishment come within the phrase 'Attachment or other Process' of R. S., Section 915, and are in force in the federal courts."

And further, on page 848 of the same volume:

> "In common law, causes in the Circuit Court and District Courts, the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided by the laws of the State in which such Court is held for the Courts thereof; and such Circuit or District Courts may from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process."

In concluding, we respectfully submit that the rule laid down in the California decisions relating to the garnishment of funds in the hands of an Officer of

the Court, after the declaration of dividends, should prevail.

There is nothing in the record on the question of assignment by Helen M. Townsend to the petitioner herein, and this question not being before this Honorable Court, the decision of the District Court should be affirmed.

Respectfully submitted,

HENRY A. JACOBS,
G. B. BLANCKENBURG,
Attorneys for Respondents.

No. 1902

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of the ARGONAUT SHOE COMPANY, Bankrupt.

W. E. PRIESTLY,

Petitioner,

vs.

HILLIARD & TABOR and WILLIAMS MARVIN CO.,

Respondents.

PETITIONER'S REPLY BRIEF

FABIUS T. FINCH,
Attorney for Petitioner.

No. 1902.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the ARGONAUT SHOE COMPANY, Bankrupt.

W. E. PRIESTLY,

Petitioner,

vs.

HILLIARD & TABOR and WILLIAMS MARVIN CO.,

Respondents.

PETITIONER'S REPLY BRIEF.

At the time of the argument the Court granted Petitioner leave to file a Reply Brief herein, and at that time it was also stipulated by attorneys for both petitioner and respondents that the following facts exist in addition to those set forth in the Petition, viz:

The Attachment in the State Courts, under which respondents claim, was issued at the same time that their Complaint was filed, and it was at that time levied by attempting to garnish funds in the hands of the Trustee of the Argonaut Shoe Company. The cases of Respondents against Helen M. Townsend have not yet been tried in the State Superior Court and no judgment has been rendered in favor of Respondents or either of them against Mrs. Townsend.

One reason for the rule prohibiting garnishments or attachments upon property in the hands of the Trustee, either before or after the dividend has been declared is that it will unnecessarily delay settlement of the bankrupt estate, and present numerous complicated matters to the Court of Bankruptcy for determination, which are entirely collateral to the main proceeding. In the present case we find the rule peculiarly illustrated. If the order of the District Court prevails, it will be necessary for the Referee to go outside of the bankruptcy proceedings and determine which is first in time, the assignment or the attachment. It will then be necessary to impound the money and delay the settlement of the estate until the case is tried in the State Courts and is there ascertained whether Respondents have or have not a legal claim against Mrs. Townsend. That Judgment would be subject to review on appeal to the State Supreme Court, and additional delay incident thereto. Thus in this case if respondents' contention is upheld, the closing of the bankruptcy proceedings of the Argonaut Shoe Company may be delayed many years by this very proceeding. The Bankruptcy Court will not tolerate this. It will not permit interference of the State Court, even where the attaching creditors have recovered a Judgment and there is nothing left but to direct the Trustee to pay the money over to them.

Since the filing of our Opening Brief the cases of

In re Hollander, 181 Fed. 1019 and

Cowart vs. Caldwell Co., 134 Ga. 544

have been reported.

We cited them and quoted from them at the oral argument and shall do no more than call the court's attention to them at this time. They are both directly in point and unusually analogous to the case at bar.

We respectfully submit that the order of the District Court should be reversed.

FABIUS T. FINCH,
Attorney for Petitioner.

No. 1905

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE AMALGAMATED SUGAR COMPANY (a Corporation),

Plaintiff in Error,

vs.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON (a Corporation),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

FILMER BROS. CO: PRINT, 330 JACKSON ST., S. F., CAL.

No. 1905

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE AMALGAMATED SUGAR COMPANY (a Corporation),

Plaintiff in Error,

vs.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON (a Corporation),

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

AMALGAMATED SUGAR COMPANY,

Plaintiff in Error,

vs.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON,

Defendant in Error.

Stipulation [Under Rule 23].

A judgment having been entered in this cause on the 16th day of May, 1910, in favor of the defendant in error and against the plaintiff in error, for the sum of $4,382.00 and costs and disbursements, and a writ of error having been duly sued out upon the judgment, which writ and citation thereon have been duly served, security for costs having been duly given at the suing out of the writ and the issuance of citation thereon,—

IT IS NOW STIPULATED by the attorneys for the parties hereto that the following parts only of the record shall be printed, viz.:

1. The judgment entered in the court below, constituting page 24 of the transcript, eliminating the title of the court and cause, the word "title" to be printed in lieu thereof.

2. The opinion of the court below, pages 26 to 29 of the transcript, eliminating the title of the court and cause, the word "title" to be printed in lieu thereof.

3. Bill of Exceptions, pages 31 to 50 of the transcript, and the exhibits thereto attached, constituting

pages 51 to 52 of the transcript, eliminating the title of the court and cause, the word "title" to be printed in lieu thereof.

4. The assignments of error, constituting pages 57 to 58 of the transcript, eliminating the title of the court and cause, the word "title" to be printed in lieu thereof.

All other matter contained in the transcript shall be omitted from the printing, but with leave to either party hereto to refer to such other parts of the transcript not printed as either party may desire or as may be necessary.

SNOW & McCAMANT,
Attorneys for the Plaintiff in Error.
CHAMBERLAIN & THOMAS,
Attorneys for the Defendant in Error.

[Endorsed]: No. 1905. In the United States Circuit Court of Appeals for the Ninth Circuit. Amalgamated Sugar Co., Plaintiff in Error, vs. United States National Bank, of Portland, Oregon, Defendant in Error. Stipulation. Filed Oct. 22, 1910. F. D. Monckton, Clerk. Refiled Oct. 24, 1910. F. D. Monckton, Clerk.

[Judgment.]

[Title.]

This cause having heretofore been duly tried by the Court, a jury trial having been waived upon the stipulation of facts and evidence produced in open court, the plaintiff appearing by Warren E. Thomas, Esq., of its attorneys, and the defendant appearing by Zera Snow, Esq., of its attorneys, and the Court

at said time not being fully advised in the premises, having taken the matter under advisement, and being now fully advised therein, and the Court having found, and does hereby find, that plaintiff is entitled to a judgment, as prayed for in its amended complaint filed herein.

It is therefore ordered and adjudged that plaintiff have and recover of and from the defendant the sum of Four Thousand ($4,000.00) Dollars, with interest thereon from the 13th day of October, 1908, at the rate of six per cent per annum, to wit: $382.00, making a total of $4,382.00, and the costs and disbursements of this action, taxed at $74.90, and that execution do issue therefor.

R. S. BEAN,
Judge.

Filed May 16, 1910. G. H. Marsh, Clerk United States Circuit Court, District of Oregon.

[Opinion.]

[Title.]

CHAMBERLAIN, THOMAS & HAILEY, Attorneys for Plaintiff.

SNOW & McCAMANT, Attorneys for Defendant.

BEAN, D. J. Action on a check. The defendant is a Utah corporation, carrying on business in this State. For convenience it kept an account at the Farmers' & Traders' National Bank of La Grande. On October 1, 1908, it drew a check on the First National Bank of Ogden, Utah, for $4,000.00 payable to itself, and on the 5th deposited same with the

La Grande Bank, using a deposit tag which had the following conditions printed on it:

"Items listed hereon are taken at owner's risk until we have reduced to our own possession the funds received by us in settlement thereof, and credits or remittances made by us therefor are subject to revocation until we have received actual final payment. Mediums of collection employed are your agents, and we assume no responsibility for their neglect, default or failure. In making this deposit, the depositor expressly assents to the foregoing conditions."

The check, however, was endorsed by the defendant "Pay to the order of the Farmers' & Traders' National Bank." The La Grande Bank was insolvent at the time, but that fact was not known to either the plaintiff or defendant or to the general public. On receipt of the check, the La Grande Bank credited defendant's account with the amount thereof which credit, however, was never used, and on the same day endorsed the check "Pay to any bank or banker," and forwarded it with other items to the plaintiff, its correspondent at Portland, "for collection and credit."

The La Grande Bank had opened an account with plaintiff in the fall of 1907, without any special agreement, however, between the two banks except as is to be inferred from the course of business between them. It was the custom for the La Grande Bank to forward to plaintiff from time to time items for collection and credit, and for plaintiff to credit such items to the La Grande Bank upon their receipt, and to advance money to or pay drafts of the La Grande

Bank upon the faith of such credit prior to the actual collection of the paper. From the time the account of the La Grande Bank was opened, plaintiff used a deposit tag for its general customers which, among other things, provided that on receiving paper payable elsewhere than in Portland it assumed no responsibility for the failure of any of its collecting agents, and should only be held liable when the proceeds in actual funds or solvent credits shall have come into its possession. This tag, however, was never used by the La Grande Bank in any of its transactions with plaintiff. The check in controversy was received by plaintiff on the 8th day of October and immediately credited to the account of the La Grande Bank and forwarded through the usual channels for collection. It reached the First National Bank of Ogden on October 12, on which day the La Grande Bank suspended. Defendant, learning of such suspension, stopped payment on the check and it was charged back, according to the usual custom of bankers, until it again reached the plaintiff. Meanwhile, however, and prior to receiving notice of the insolvency of the La Grande Bank and without any knowledge of defendant's ownership of the check or the conditions upon which it had been received by the La Grande Bank, unless it is to be inferred from the fact that that bank forwarded the check to it for collection and credit, the plaintiff, on the faith of the check and according to the usual course of business between it and the La Grande Bank, cashed drafts of the latter for the full amount of the check together with the subsequent credits, so

that at the time it received notice of the insolvency of the La Grande Bank and that the payment of the check had been stopped, the La Grande Bank had a credit with it of only $9.85.

Upon these facts, I think the plaintiff is entitled to judgment.

If it be conceded that the La Grande Bank was a mere collecting agent, plaintiff had no knowledge of that fact. The endorsement of the check by defendant to the La Grande Bank was unrestricted. It thereby became the apparent owner, and could pass good title to a subsequent holder in due course, for value and without notice. It forwarded the check to plaintiff with an unrestricted endorsement thereon. Plaintiff, without notice or knowledge of defendant's title or the insolvency of the La Grande Bank, advanced money and paid drafts of the La Grande Bank drawn on it in the usual course of business, to the full amount of the check, relying on the apparent ownership. Defendant could have given notice of its title by endorsing the check to the La Grande Bank "For collection." It chose, however, to give an unrestricted endorsement, and thus permitted the paper to pass out into the channels of trade as apparently the property of the La Grande Bank and must abide the consequence. The fact that the check was forwarded by the La Grande Bank to plaintiff for "collection and credit," that it has not been collected and that plaintiff, according to the custom of bankers, could charge it back to the La Grande Bank, are immaterial. The question is whether the plaintiff had a right to treat the La Grande Bank as the

owner of the check and pay its drafts on the faith of such ownership. It certainly had that right because the check had been endorsed without restriction by the apparent owner. Having made advances thereon to the amount of the check in good faith, without knowledge of defendant's title, plaintiff is entitled to collect it.

2d Morse on Banking, 4th Ed., 961.

3 E. & A. Enc. of Law, 2d Ed., 815.

Continental Bank vs. Bank, 2 A. & E. An. Cases, 116, and note.

Bank of Met. vs. New England Bank, 1st Howard, 234.

Victrey vs. State Sav. Assn., 21 Fed. 773.

Cody vs. Bank, 55 Mich. 379.

Miller vs. F. & M. Bank, 30 Md. 392.

Ayers vs. F. & M. Bank, 79 Mo. 79.

Doppelt vs. Natl. Bank, 175 Ill. 432.

Hoffman vs. Natl. Bank, 46 N. J. Law, 505.

Wyman vs. Col. Natl. Bank, 5 Col. 30.

Portland, Oregon, May ——, 1910.

Opinion. Filed May 16, 1910. G. H. Marsh, Clerk. By J. W. Marsh, Deputy.

[Title.]

Defendant's Bill of Exceptions.

Be it remembered that this cause came on for trial before the Court upon the written stipulation thereto by the parties to the cause by their counsel, and the cause was heard and determined upon the following stipulation of facts and evidence received in the cause, to wit:

There was filed in the cause, and submitted, written stipulation of facts entered into by the parties to the cause by their respective attorneys, and the affidavit of G. E. McCully, submitted by like stipulation of parties, copies of which stipulation of facts and affidavit are hereto annexed and are as follows:

[Stipulation of Facts.]

[Title.]

STIPULATION OF FACTS AND FOR TRIAL BEFORE THE COURT WITHOUT A JURY.

It is now stipulated between the parties to this cause by their attorneys of record that this cause may be tried before the court, jury trial being hereby waived; and an order of Court may be entered accordingly at any time.

The following facts are stipulated for the use of either party to the cause, and this stipulation shall be used at the trial of this action, whether formally offered by either party or otherwise.

I.

Plaintiff and defendant are corporations respectively as in the complaint and the answer alleged; plaintiff transacts a general banking business under the provisions of the National Banking Act of the United States at Portland, Oregon, and it was so engaged in business at the time of the occurrences hereinafter stipulated. The defendant keeps its principal corporate moneys for the transaction of its business at its home office at Ogden, Utah, and transacts its principal banking business at that place through the First National Bank of Ogden, Utah,

and so it transacted business at the time of the occurrences hereinafter mentioned, but at the time of such occurrences kept and maintained, and still maintains, a branch business in the State of Oregon, at La Grande, Oregon, and at that place it kept also a bank account as a depositor with the Farmers' & Traders' National Bank of La Grande, this account being there kept for the convenience of its La Grande business.

II.

The Farmers' & Traders' National Bank of La Grande, Oregon, at the time of the occurrences hereinafter stipulated, was a national bank carrying on a general banking business under the National Banking Laws of the United States, its business being transacted at La Grande, Oregon, and it had been there so engaged in such business for a number of years prior to the transactions herein stipulated.

III.

In November, 1907, and shortly after the suspension of business by the Merchants' National Bank of Portland, with which bank the La Grande Bank above referred to was then exchanging business, Mr. J. B. Thorson, of the First National Bank of Elgin, Oregon, came to Portland. He had been requested to arrange for a correspondent at Portland, Oregon, for the La Grande Bank, and thereupon he opened an account for the La Grande Bank with the plaintiff, depositing some moneys to the credit of the La Grande Bank and requesting plaintiff to ship to the La Grande Bank $250.00 in silver. Thereupon the following correspondence passed between the plain-

tiff and the La Grande Bank touching the opening of the account, and no other arrangements were made between the La Grande Bank and the plaintiff other than that disclosed by the following correspondence, namely, a letter from the plaintiff's cashier to the La Grande Bank, of date November 22, 1907, and reply letter thereto by the assistant cashier of the La Grande Bank, the two letters being as follows:

"THE UNITED STATES NATIONAL BANK
OF PORTLAND, OREGON.

November 22, 1907.

The Farmers' and Traders' National Bank,
La Grande, Oregon.

Gentlemen:

Permit me to inform you that we have received this day a deposit from Mr. Thorson of the First National Bank of Elgin for your credit.

I wish to thank you for your kind consideration in designating this Bank as your Portland correspondent and to assure you that your account, whether large or small, will be appreciated and given every consideration.

Pursuant to Mr. Thorson's request, we are shipping you this day $250.00 in silver, charging your account a like amount to cover. We are also enclosing you under separate cover stickers to be used on your bank drafts when drawing against funds to your credit with this Bank.

Trusting that our business relations will be both pleasant and profitable, I am,

Yours very truly,

R. W. SCHMEER,

Cashier."

"LA GRANDE, OREGON, 11/23, 1907.

R. W. Schmeer, Cashier,

United States National Bank,

Portland, Oregon.

Dear Sir:

I have your esteemed favor of the 22d at hand and contents are duly noted, and in the absence of our Cashier, Mr. J. W. Scriber, who was called to Salem, Oregon, on this evenings train by a telegram conveying to him the news of the death of a sister, I reply instead.

The $250.00 in silver has reached us also, which amount we pass to your credit.

We note that you are sending us stickers to be used on our drafts, which we have not yet received.

Would like also that you send us an application for making you our Portland reserve depository.

We are sending in another remittance to-day which you will receive in due time.

Thanking you for courtesies, we remain,

Yours truly,

G. E. McCULLY,

Asst. Cash."

Signature card attached.

The "stickers" referred to in the letter of the plaintiff's cashier were not inclosed.

At the time of the opening of this account there

was in use, established by the plaintiff, and for the use of its local depositors, the following form of deposit tag, but this form of deposit tag was not used for deposits with the plaintiff by the La Grande Bank.

"Form 15-275 M 9-22-08.

Portland, Ore.,.....190....

Deposited With

THE UNITED STATES NATIONAL BANK

Subject to Conditions Below.

Acc't ....

By ....

....

In receiving checks on deposit payable elsewhere than in Portland, this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, whether the collecting agent be the person or concern on which the check for collection is drawn or not, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may be charged back to the depositor's account. In making this deposit the depositor hereby assents to the foregoing conditions.

List Portland checks by Clearing House number.

Other items by name of place where payable.

2. Canadian Bank of Commerce.
4. First National Bank.
5. Ladd & Tilton Bank.

Gold.....

Silver.....

Currency.....

CHECKS AS FOLLOWS

6. Bank of California. .....
7. Merchants' National Bank. .....
11. United States National Bank. .....
13. Security Savings & Trust Co. .....
15. Lumbermen's National Bank. .....
16. Portland Trust Co. .....
17. Hibernia Savings Bank. .....

....
....
....
....

IV.

On October 6, 1908, by a deposit tag dated October 5, 1908, the defendant deposited with the Farmers' & Traders' National Bank at La Grande, Oregon, to its credit, and a credit accordingly was entered on the books of the said bank, a check for the sum of $4,000.00, which the defendant had drawn in favor of itself on the First National Bank of Ogden, Utah, and which it had endorsed over to the Farmers' & Traders' National Bank. A true copy of the check is set out in the plaintiff's complaint. The following endorsement was made upon the check by the defendant:

"Pay to the order of Farmers' & Traders' National Bank.

(Signed) AMALGAMATED SUGAR COMPANY,
By H. M. MONSON,
Cashier.

At this time the defendant's credit with the La Grande Bank was largely in excess of any outstanding checks which it had drawn against its account, and its credit, exclusive of the deposited check, was at all times in excess of its debits or checks drawn against its account. A true statement of the defendant's bank account with the La Grande Bank between September 30, 1908, and October 10, 1908, the date of the suspension of the La Grande Bank hereinafter stipulated, but including the business of October 10, 1908, is as follows:

"AMALGAMATED SUGAR CO
La Grande, Oregon.

In Account With
THE FARMERS' AND TRADERS' NATIONAL BANK,
La Grande, Oregon.

1908.				1908.			
Oct.	1.	Check	59.75	Sep.	30.	Balance	2265.31
	3.	"	103.	Oct.	1.	Dep.	90.
	"	"	115.		3.	"	2691.51
	5.	"	74.40		6.	"	4000.
	"	"	48.73				
	6.	"	5.40				
	7.	"	18.58				
	8.	"	1.50				
	9.	"	9.09				
	"	"	35.69				
	"	"	97.				
	10.	"	48.40				
	"	"	4.40				
	"	"	224.77				
	"	"	5.				
	"	"	7.				
	"	"	3.94				
	"	"	5.				
	"	"	5.80				
	"	"	6.				
	"	"	34.60				
	"	"	61.50				
	"	"	16.80				
	"	"	49.60				
	"	Balance	8005.87				
			9046.82				9046.82

1908.
Oct. 10. Balance .. 8005.87"

In making the deposit with the La Grande Bank referred to the defendant used a deposit tag or slip of the form generally in use and provided for by the La Grande Bank for its local depositors, a copy of the deposit tag for the deposit in question being as follows:

"Deposited With
FARMERS' & TRADERS' NATIONAL BANK
By Amalgamated Sugar Co.
Per

La Grande, Or., Oct. 5" 1908.

Items listed hereon are taken at owner's risk until we have reduced to our own possession the funds re-

ceived by us in settlement thereof, and credits or remittances made by us therefor are subject to revocation until we have received actual final payment. Mediums of collection employed are your agents, and we assume no responsibility for their neglect, default or failure. In making this deposit the depositor expressly assents to the foregoing conditions.

PLEASE LIST EACH CHECK SEPARATELY.	Dollars.	Cents.
Gold	.....	
Silver	.....	
Currency	.....	
Checks as follows:		
A. S. Co. ... #337	4000	.....
.....	.....	.....
.....	.....	.....
Total	$4000	.....

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED.

At the time of making this deposit by the defendant the defendant did not know the financial condition of the La Grande Bank and did not know that at the close of business on October 10, 1908, when it closed its doors at the close of business on that day it would not again open for business, as it did not thereafter, as hereinafter stipulated.

V.

The La Grande Bank, through its cashier, J. W. Scriber, endorsed the check in question received from defendant with the following endorsement:

"Pay to the order of any Bank or Banker.

FARMERS' & TRADERS' NATIONAL BANK, LA GRANDE, OREGON,

By J. W. SCRIBER,

Cashier."

And on October 6, 1908, he forwarded the check with some other items of bankable paper to the United States National Bank, with the following letter:

"FARMERS' AND TRADERS' NATIONAL BANK,
LA GRANDE, OREGON.

October 6, 1908.

United States National Bank,
Portland, Oregon.

Enclosed find for collection and credit.

Respectfully,
J. W. SCRIBER, Cashier.

Protest all items over $10.00 unless otherwise instructed."

Inclosed in this letter were eleven items of miscellaneous checks and like character of bank paper aggregating $4,226.03, among which items was the check in question.

The remittances referred to were received by the plaintiff on October 8, 1908, and on that date plaintiff gave credit for the items in question, including the check in question, to the La Grande Bank, entering a credit upon its books accordingly. At this time the plaintiff was using the form of deposit tag for its local depositors hereinbefore referred to.

VI.

At the time of the receipt of the check in question by plaintiff, plaintiff's correspondent at Salt Lake City, Utah, was McCornick & Company, Bankers, to whom from time to time it was in the habit of forwarding its bankable paper received in due course

of business, taking credit therefor on the books of that bank, and from time to time drawing against such credits, and on October 8, 1908, the plaintiff forwarded to McCornick & Company the check in question, with the following letter, which was the form usually used by the plaintiff in making such remittances.

"UNITED STATES NATIONAL BANK.

Portland, Ore., Oct. 8, 1908.

McCornick & Company, Bankers,

Salt Lake City, Utah.

We enclose for collection and credit.

Respectfully,

R. W. SCHMEER, Cashier.

Items marked X no protest.

Do not protest items $20 or under."

The list of collections noted in the above letter consisted of two items, among them the check in question. McCornick & Company received the check in question on October 12, 1908, and gave credit on its books to the plaintiff therefor, and on the same date forwarded it to the First National Bank of Ogden, Utah, for credit, and the check was returned by the latter bank to McCornick & Company on October 14, 1908, payment being refused, plaintiff in the meantime having stopped payment thereon by reason of the failure of the La Grande Bank hereinafter stipulated. On October 14, 1908, McCornick & Company charged back the amount of the check to plaintiff and returned the same to plaintiff. The credit balance of plaintiff with McCornick & Company be-

tween the time of the book credit for the check in question above referred to and the date of the charging back of the same to plaintiff was in excess of plaintiff's debit charges arising from current business. When the check in question was forwarded by plaintiff to the Salt Lake Bank, plaintiff caused the following endorsement to be made thereon:

"Pay to the order of any Bank or Banker.
Prior Endorsement Guaranteed, Oct. 8, 1908.
U. S. NATIONAL BANK,
Portland, Oregon,
R. W. SCHMEER, Cashier."

McCornick & Company in turn when forwarding the check to Ogden for credit made the following endorsement on the check:

"Pay to the order of any Bank or Banker.
McCORNICK & COMPANY,
Salt Lake City, Utah."

VII.

The Farmers' & Traders' National Bank of La Grande, Oregon, had a capitalization of $60,000.00; its outstanding obligations, as shown by its books, at the date of its suspension on October 12, 1908, were $214,983.20. The actual amount of claims, however, proven up against the bank, now in the hands of the Receiver, is $219,673.66. There was in the bank's vaults at the time of its suspension, October 12, 1908, $20,072.67 in money.

VIII.

Between the time of the deposit by the defendant with the La Grande Bank of the check in question, to wit, October 6, 1908, and up to and including Satur-

day, October 10, 1908, the La Grande Bank continued its banking business during its usual banking hours, and on Saturday, October 10, 1908, and at the close of the usual hours for banking business on that date the bank closed its doors and did not again open for business, there being posted on the doors of the bank on Monday morning, October 12, 1908, a notice which stated:

"Bank closed pending arrival of the National Bank Examiner."

On October 13, 1908, a National Bank Examiner arrived and took charge of the bank, and he remained in charge until November 5, 1908, when by due appointment by the Comptroller of the Treasury a receiver for the bank was appointed, and the bank has been in process of liquidation since that time. And up to the date of this stipulation the receiver of the bank has paid by way of dividend to the creditors of the bank 45 per cent of the proved claims against the bank, the amount of claims proved against the bank aggregating the sum of $219,673.66.

IX.

The Cashier of the La Grande Bank, J. W. Scriber, and Assistant Cashier G. E. McCully kept respectively what were called teller's cash-books, the latter keeping in his own book the cash balances of the bank from day to day, entering therein the amount of cash on hand held by the Cashier, Scriber, as reported by Scriber. These teller's cash-books disclosed that at the close of business October 10, 1908, there should have been on hand by the bank in cash $36,576.50, the major part of which was reported by

Scriber to McCully as being on hand at his, Scriber's desk. The actual balance, however, on hand at the close of business on October 10, 1908, was $24,054.25. But there was on hand October 12, 1908, at the time the bank failed to open on that date, only the sum of $20,072.67, as heretofore stated in paragraph VII of this stipulation.

There are now four indictments pending in the United States District Court of Oregon against J. W. Scriber, Cashier of the La Grande bank, in which there are various counts, the indictments being for embezzlement in a United States National Bank; for false entries and reports to the Comptroller of the Treasury of the United States; for false entries in a national bank of the United States; and for perjury. The charge of embezzlement consists of a charge of cash shortage from the desk of J. W. Scriber, Cashier, of $12,522.25 in money, reported by him to Assistant Cashier McCully as on hand October 10, 1908, and which in fact was not on hand by the bank at that time.

ZERA SNOW,
Of Attorneys for Defendant.
WARREN E. THOMAS,
Of Attorneys for Plaintiff.

Substance of the Affidavit of G. E. McCully.

The affidavit referred to was an affidavit filed in the cause, dated the 14th of February, 1910, and by stipulation the affidavit was to be received and considered as though the witness had been personally present and testified at the trial.

The substance of the testimony given by the affiant by his affidavit was that on October 6, 1908, at the time of the deposit of the defendant's check with the Farmers' & Traders' National Bank of La Grande, that bank was insolvent, known to be such by its then Cashier, G. W. Scriber, and that the witness had discovered the insolvency by an investigation of the books of the bank while he was aiding the receiver of the bank subsequent to its failure, and the witness gave some details of the depletion and depreciation of the assets of the bank caused by the action of this Cashier, G. W. Scriber. He testified further that he had been an Assistant Cashier of the bank before its suspension, but that the bank was under the sole management of G. W. Scriber, its Cashier, who controlled and directed its business policy, passed upon its loans made and determined as to the sufficiency of the collateral for the loans made. He testified further to finding forged paper among the assets of the bank which had been carried as genuine paper.

(The foregoing is the substance of all of the testimony given by the witness by his affidavit.)

[Testimony of Cashier.]

The cashier of the plaintiff was likewise called as a witness, and in substance testified that the plaintiff's bank became the Portland correspondent of the Farmers' & Traders' National Bank of La Grande, and entered into business relation with it substantially as in the stipulation of facts stated; that during the existence of such relationship it was the custom of the La Grande Bank to remit to the plaintiff from

time to time checks, drafts and bankable paper of the character of the check in suit, and for the plaintiff to credit the La Grande Bank with the amount thereof upon their receipt and put the same in process of collection, and to honor and pay the checks of the La Grande Bank against such account from time to time as such checks and drafts were presented, prior to the collection of the paper so deposited by the La Grande bank with the plaintiff bank; that the check in question was received and the La Grande bank credited therewith as cash, and the full amount so credited was paid out by the plaintiff bank upon drafts of the said La Grande Bank; that the plaintiff bank had no knowledge of the insolvency of the La Grande Bank at the time it received defendant's check, and the first knowledge and information which the plaintiff bank had of the insolvency of the La Grande bank, or that it had closed its doors for business, was a telegram received from the cashier of the La Grande National Bank (another bank) advising that the La Grande Farmers' & Traders' Bank had closed its doors, which telegram was received at Portland, Oregon, on the evening of October 12, 1908, after the close of banking hours in Portland on that date, to wit, 6:20 o'clock P. M., but which telegram did not reach the desk of the officers of the plaintiff bank until the following morning, to wit, October 13, 1908, nor had the plaintiff bank nor any of its officers notice of such suspension or of the La Grande bank's insolvency, prior to the receipt of said telegram on the morning of October 13, 1908; that the account of the La Grande bank with the plaintiff

bank was closed as of the close of business October 12th, 1908; that at the close of business on Saturday, October 10th, 1908, the balance on the books of the plaintiff bank to the credit of the La Grande Bank was One Thousand Eight Hundred Thirty-nine and One Hundredth ($1,839.01) Dollars; that on October 12th, 1908, without any knowledge of the suspension of the La Grande Bank or of its insolvency, plaintiff bank honored checks and drafts on it by the La Grande bank, reducing the balance at the close of business on October 12th, 1908, to Nine and Eighty-five Hundredths ($9.85) Dollars; that subsequently two items aggregating Three Hundred Sixty-six and Fifty-two Hundredths ($366.52) Dollars, were received by the plaintiff bank from the Examiner in charge of the La Grande Bank, which had been forwarded by plaintiff bank to the La Grande Bank, and the account of the La Grande bank credited therewith, for the reason that the same was not received by the La Grande bank prior to the suspension, which amount, together with the balance of Nine and Eighty-five Hundredths ($9.85) Dollars, was subsequently paid by the plaintiff bank to the Receiver of the La Grande bank; that the checks, drafts and bankable paper forwarded by the La Grande bank to the plaintiff bank was received by plaintiff and credited the same as cash, and it was the practice to allow the La Grande bank, and it was entitled to and had a right, according to the course of dealing between the two banks, and the general custom of bankers occupying similar relations, to draw against said account the same as if cash had been

deposited in lieu of checks or drafts, and these drafts or checks were paid by plaintiff when presented over its counter, or through the clearing-house, or from other sources; that it is a general custom amongst banks when remitting checks or drafts for deposit with another bank, to accompany the same with a letter stating "enclosed for collection and credit," and that it is a general custom amongst banks to immediately credit the account of the bank from which the checks or drafts have been received with the amount thereof, the same as cash, and then to advise such bank that its account has been credited with the amount of the remittance; and that the remitting bank may thereupon, if it so desires, draw against such account, and its draft or drafts will be paid prior to the collection of the remitted checks or drafts; and in the event of the failure to collect such remitted drafts or checks, the bank so crediting has the right to charge back the amount which it has failed to collect, on account such checks or drafts, if the depositing bank has any account remaining against which the charging back may be made, thus decreasing the amount credited to the remitting bank in the amount which the bank of deposit has failed to collect, and that the plaintiff bank and the La Grande bank followed such custom in their general dealings with each other, and in connection with the check in question, except that the amount of said check was not charged back for the reason that the La Grande bank had no funds in plaintiff bank against which the same might be charged back; that the banking hours of the plaintiff bank were from

ten o'clock in the morning to three o'clock in the afternoon, excepting on Saturday, when the bank closed at twelve o'clock noon, no banking business being done on Sunday.

There is attached hereto and made a part hereof, marked Exhibit "A," a copy of Plaintiff's Exhibit "A" in said case, showing a statement of the account of the said La Grande bank with the plaintiff bank from October 1st, 1908. There is also attached hereto and made a part hereof, marked exhibit "B," Plaintiff's Exhibit "B" in this case, it being a statement of the daily balances of the La Grande bank with the plaintiff bank from October 1st, 1908, to October 15th, 1908.

Upon the foregoing evidence and the stipulation of facts and affidavit of G. E. McCully, which contain all of the evidence submitted to the Court, the cause was submitted to the Court for decision by the parties hereto, and at the close of the evidence the defendant moved the Court for an adjudication and determination that under the stipulated facts of the cause, defendant was not liable upon its check to the plaintiff and moved for a finding and judgment accordingly, as likewise did the plaintiff move the Court for an adjudication and determination that under the stipulated facts and the evidence the defendant was liable upon the check, and moved the Court for judgment accordingly and for judgment for the amount of the check and interest.

The Court took the several motions of the plaintiff and defendant under advisement and thereafter filed its opinion in the cause, which is on file and now re-

ferred to and made a part of this bill of exceptions, and overruled the defendant's motion and allowed the motion of the plaintiff and the judgment entered in the cause was thereupon entered, the defendant in open court excepting to the ruling of the Court and to the entry of the judgment on the ground that the same was contrary to law, and that under the stipulated facts and evidence in the cause a finding and determination of the law should have been had that the defendant was not liable upon its check, and that judgment should be entered for the defendant accordingly, which exception was by the Court allowed.

[Order Allowing Bill of Exceptions, etc.]

And now, because the foregoing matters and things do not fully appear of record in the cause, the foregoing bill of exceptions is signed and sealed and allowed as the defendant's bill of exceptions in the cause, and it is hereby certified that the foregoing contains substantially all of the evidence offered in the cause, and that the Court accepted and adopted in the cause the stipulation of facts set forth in the foregoing bill, and further concluded from the evidence in the cause that the Farmers' & Traders' National Bank of La Grande was insolvent at the time of the receipt by it of the defendant's check for deposit to the defendant's account, but that the defendant did not know of such insolvency until the 12th day of October, 1908, and that the plaintiff did not know of such insolvency until the 13th day of October, 1908.

Let this bill of exceptions be filed in the cause as of the date of the judgment.

[Signed] R. S. BEAN,
Judge Sitting at the Trial.

[Plaintiff's Exhibit "A" (Copy).]

Form 19-5M 6-19-09

Farmers' and Traders' Nat'l Bank of La Grande, Oregon

With

THE UNITED STATES NATIONAL BANK of Portland, Oregon.

Exhibit "A."

~~Interest Account for~~ ———— 1908.

	Debit Balances		Credit Balances
		29	
		30	
		31	
October		1	1701.72
		2	3341.88
		3	1938.65
		4	
		5	2562.95
		6	1280.25
		7	3678.18
		8	3041.59
		9	3526.60
		10	1839.01
		11	
		12	9.85
		13	9.85
		14	9.85
		15	376.37
		16	
		17	
		18	
		19	
		20	
		21	
		22	
		23	
		24	
		25	
		26	
		27	
		28	

To your Credit, $————

[Plaintiff's Exhibit "B" (Copy).]

Form 161 2000-10-11-09

Please Examine and Report as Soon as Possible.
Farmers' and Traders' Nat. Bank, La Grande, Ore.

Exhibit "B." In Account with THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON.

Date. Oct-1908.		Debit.		Date.		Debit.		Date.	Number or Date of Letters.		Credit.
								Sep. 30		Balance	900.63
1	40715	8.50		9	Forward	639.34		Oct. 1	Rem. 9/29		1020.26
	2	30.			40763	25.05		2	" 30		2897.64
	4	22.50			74	320.95		3	" 10/1		1050.74
	09	123.97			5	18.20		5	" 3		420.22
	5	34.20	219.17		6	218.90			" 2		4110.51
2	40724	68.55			3	122.25		7	" 5		3622.35
	1	58.05			80	5.		8	" 6		4226.03
	19	358.01			91	63.85	1413.54	9	" 7		1898.55
	22	115.		10	R	232.38		10	" 8		119.15
	20	163.51			40764	170.26		12	Deposit by Amer. Nat. Pendleton		1500.
	71	494.36	1257.48		72	69.90			Rem. 10		2198.48
3	R	17.96			Exc.	.05			" 9		4688.74
	40736	1820.50			40785	16.90			Our Rem. 10 Returned		134.14
	676	72.45			3	899.28			" " 9 "		232.38
	723	51.84			1	54.22					
	5	31.75			2	325.70					
	30	221.72			77	5.50					
	27	124.85			9	12.55					
	9	92.90			1	20.	1806.74				
	629	20.	2453.97	12	R	134.14					
5	R	128.82			40788	40.					
	40749	2453.53			9	50.					
	18	40									

		32	117.78	3906.43		3	145.56	
	6	R	479.79			87	58.88	
		40739	35.			92	427.70	
		40	165.16			90	88.01	
		34	495.			5	1052.46	
		566	50.			814	80.83	
		746	57.75	1282.70		06	1601.28	
		R	4.35			40800	1433.47	10216.38
	7	40757	319.86		Dec.			
		1	25.		2	c/e for balance sent		
		61	15.			to Receiver		376.37
		16	10.					
		54	560.85					
		44	5.					
		53	59.36				29019.82	29019.82
		5	25.					
		04	200.	1224.42				
	8	R	273.05					
		40766	73.43					
		56	34.50					
		62	99.90					
		70	289.88					
		68	3679.15					
		50	75.					
		65	251.40					
		58	71.31					
		17	15.	4862.62				
	9	R	.64					
		40769	250.					
		26	20.					
		78	368.70					
	Fwd.		639.34					

[Title.]

Assignments of Error.

Comes now the defendant and upon its petition now filed for a writ of error to review in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered in this cause and court against the defendant and in favor of the plaintiff, makes the following assignments of error, upon which the defendant as plaintiff in error to the said writ will rely for a reversal of the judgment, namely:

1. The Court erred in overruling the motion of the defendant, the plaintiff in error under the writ, for a judgment against the plaintiff in the cause, the defendant in error to the writ, the motion being based upon the stipulated facts and evidence in the cause and the findings of fact therefrom by the court made, and in sustaining the motion of the plaintiff for a judgment in its favor in the cause and in entering judgment against this defendant and in favor of the plaintiff.

2. Under the stipulated facts and evidence in the cause and the findings of the Court below in which the judgment was entered, the judgment in the cause should have been in favor of the defendant, plaintiff in error herein, and against the defendant in error, the plaintiff in this cause, which findings of fact are disclosed by the bill of exceptions filed in the cause, and the Court erred in entering the judgment herein.

3. Under the stipulated facts and evidence in the cause and the findings of the Court made therefrom

and filed in the cause it was error to enter judgment herein against this defendant for a greater sum than the amount of the face of the check sued upon herein and interest, less the sum of $376.37, the true balance to the credit of the Farmers' & Traders' National Bank of La Grande at the time of the suspension of that bank.

And upon the foregoing several errors now assigned the defendant herein, plaintiff in error to the writ petitioned for, prays a reversal of this judgment.

[Signed] ZERA SNOW and
WALLACE McCAMANT,
Attorneys for Amalgamated Sugar Company.

Filed Sep. 15, 1910. G. H. Marsh, Clerk Circuit Court of the United States for the District of Oregon.

[Endorsed]: No. 1905. United States Circuit Court of Appeals for the Ninth Circuit. The Amalgamated Sugar Company (a Corporation), Plaintiff in Error, vs. The United States National Bank of Portland, Oregon (a Corporation), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Oregon.

Filed October 24, 1910.

F. D. MONCKTON,
Clerk.

No. 1905

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

THE AMALGAMATED SUGAR COMPANY
a corporation

PLAINTIFF IN ERROR

VS.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON
a corporation

DEFENDANT IN ERROR

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT
DISTRICT OF OREGON

Brief for Plaintiff in Error

SNOW & McCAMANT,
For the Plaintiff in Error

GEO. B. GUTHRIE,
On the Brief.

CHAMBERLAIN, THOMAS
& KRAEMER,
For the Defendant in Error.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND, OREGON

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Daily credit balance, La Grande Bank (See Ex. "A," Printed Record, p. 28).

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No. 1905

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

THE AMALGAMATED SUGAR COMPANY,
Plaintiff in Error,

v.

UNITED STATES NATIONAL BANK OF PORTLAND,
Defendant in Error.

Brief for Plaintiff in Error

Action in the court below by defendant in error upon a check drawn by the plaintiff in error to its own order deposited with the Farmers & Traders' National Bank of La Grande (now in course of liquidation), which found its way into the hands of the defendant in error for collection in the course of an interchange of banking business between the two banks. Before presentation of the check for payment the La Grande Bank failed, in consequence of which the drawer having stopped payment, the check was dishonored on presentation. Trial was had before the court without a jury, the facts being principally stipulated. Findings of Fact were found and the same and substantially all of the evidence are certified in the bill of exceptions. Judgment was entered for the full amount of the check and interest, and questions are raised as to any

liability, or if liable whether the drawer of the check, the plaintiff in error, is not entitled to credit for the balance due to the La Grande Bank from the Portland Bank at the time of the failure of the former.

The action below against plaintiff in error is probably grounded on its supposed liability as drawer or indorser of the check; but the check not having been collected, the case is unembarrassed by any question of mingling of proceeds of collection by the collecting bank and the right under such circumstances of disposition of proceeds of collection.

For convenience, throughout this brief, the plaintiff in error is designated as the Sugar Company, the defendant in error as the Portland Bank, and the Farmers & Traders' National Bank of La Grande as the La Grande Bank.

STATEMENT OF CASE

The Sugar Company is a Utah corporation, transacting its main business and maintaining its corporate offices at Ogden, in that State, where its funds are principally kept; but it maintained a branch business at La Grande, Oregon, and for convenience of its business there, was a depositor with the La Grande Bank, which, prior to the occurrences giving rise to the present action, had opened an account with the Portland Bank as a depositor and for interchange of business accordingly, each receiving and collecting checks, drafts and like character of bankable paper forwarded from the one to the other. This business relation was established in the Fall of 1907, during the panic of that year, at a time when by reason of the failure of another bank of Portland, new banking connections were

desired on the part of the La Grande Bank. The stipulated facts disclose that the business relation was opened at the instance of the La Grande Bank, and some correspondence was had between the two banks at the establishment of the relation, but there is nothing in the correspondence disclosing any contract or arrangement between them touching the manner in which their business should be carried on, and the Portland Bank did not undertake any obligation to advance moneys or give credit to the La Grande Bank upon checks, drafts or like character of bankable paper received in the course of interchange of business, though the course of business between the two banks was each to give credit to the other for this character of paper received by the one from the other, and to charge back the amount credited if the paper was not paid.

On October 1, 1908, the Sugar Company at Ogden, Utah, drew its check on the First National Bank of that city in its own favor for the sum of $4,000.00, forwarded it to its managing agent at La Grande, where on October 6th it was deposited with the La Grande Bank on a general indorsement to that bank sufficient to pass title to the check. The deposit tag used in making the deposit contained the following notation:

> "Items listed hereon are taken at owner's risk until we have reduced to our own possession the funds received by us in settlement thereof, and credits or remittances made by us therefor are subject to revocation until we have received actual final payment. Mediums of collection employed are your agents, and we assume no responsibility for their neglect, default or failure. In making this deposit the depositor expressly assents to the foregoing conditions."

At the time of the making of this deposit the La Grande Bank was insolvent and so known to be by its managing officers, but the fact of insolvency was unknown to the Sugar Company. The Sugar Company likewise at the time of the deposit already had to its credit with the La Grande Bank a considerable balance, which in fact was never exhausted, and the credit given for the check deposited was never drawn upon, nor were any advances made thereon; this credit, therefore, was a mere paper or book credit.

Following the deposit and on October 6th, the La Grande Bank forwarded the check with other items of bankable paper to the Portland Bank with a general indorsement of "Pay to any bank or banker," but with a letter stating that the check and other inclosures remitted at the same time were sent "for collection and credit." At this time the La Grande Bank already had a large balance to its credit with the Portland Bank.

Upon the receipt of the check and its accompanying letter the Portland Bank gave immediate credit on its books to the La Grande Bank for the amount of the check, indorsed the same "Pay to any bank or banker," and forwarded it to McCornick & Company, Bankers, at Salt Lake, with a letter stating that it was sent "for collection and credit." McCornick & Company gave credit upon its books to the Portland Bank, forwarded the check to Ogden, Utah, to the First National Bank, upon which it was drawn, with like indorsement, and with a like letter "for collection and credit," where payment was refused, payment having been stopped by the Sugar Company upon learning of the insolvency of the La Grande Bank, which

bank had closed its doors at the close of business on Saturday, October 10, 1908, and did not again reopen, and is now in course of liquidation. McCornick & Company returned the check to the Portland Bank, charging back to it the amount of the check, credit for which had been given.

In the meantime, and pending the presentation of the check for collection, the Portland Bank had honored drafts drawn upon it by the La Grande Bank against credits which had been given both before and subsequent to the receipt of the check in question, and at the time of the failure of the La Grande Bank, at the close of business October 10th, it had a credit with the Portland Bank of $1,839.01. During the business day of October 12th the Portland Bank continued to pay checks and drafts of the La Grande Bank, and at the close of business on that day the ostensible credit of the La Grande Bank was $9.85. A readjustment, however, of the credits disclosed a true credit of $376.37, which sum was subsequently paid to the Receiver of the La Grande Bank, who in the meantime had been appointed at the instance of the Secretary of the Treasury. (See Exhibit "A" Printed Record, page 28).

At the time of the receipt by the Portland Bank of the check in question that bank was using a deposit slip for its general depositors which, among other things, provided:

> "In receiving checks on deposit payable elsewhere than in Portland this Bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, whether the collecting agent be the person or concern upon which the check was drawn or not, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may

be charged back to the depositor's account. In making this deposit the depositor hereby assents to the foregoing conditions."

While the La Grande Bank did not use this form of deposit tag in sending its remittances to the Portland Bank it sufficiently appears from the record that the business relations established between the Portland and La Grande Banks called for no other obligation on the part of the Portland Bank than that indicated by its deposit tags used for general depositors.

Assignments of error were made upon the suing out of the writ of error in this case and may be grouped as follows:

ASSIGNMENTS OF ERROR

I.

Under the facts found by the court and certified in the bill of exceptions and the evidence thereon, plaintiff in error was not liable upon the check at the suit of the defendant in error, and judgment should have been passed accordingly.

II.

Under the facts found and the stipulated evidence certified, the plaintiff in error, if liable at all, can be held only for the amount of the check and interest, less the sum of $1,839.01, which was the credit balance of the La Grande Bank with the Portland Bank at the close of business October 10, 1908, the date of the failure of the La Grande Bank, or at least the sum of $376.37, which was the finally adjusted credit after allowing the Portland Bank credit for drafts of the La Grande Bank, paid October 12, 1910, and the judgment should be reduced accordingly.

POINTS AND AUTHORITIES

I.

Under the conditions of the deposit of the check in suit with the La Grande Bank that bank did not become a purchaser for value from the Sugar Company; the bank was practically an agent for collection, and did not become the holder of the legal title to the check for two reasons:

(a) Under the deposit slip used and required by the La Grande Bank that bank became a collecting agent merely, and while it is true a credit was given to the Sugar Company upon its deposit account, the credit was provisional. The La Grande Bank assumed no liability, but distinctly stipulated that the paper was received for collection and with an authority if credit had been given to recall the credit at any time. As the La Grande Bank, therefore, assumed no liability and paid nothing for the check and never became unconditionally liable to the Sugar Company for its amount, title thereto never passed, and the bank became a collection agent merely.

In re State Bank, 57 N. W. Rep. 336 (Minn.).

In re Bank of Minnesota, 77 N.W. Rep. 796 (Minn.).

Armour Packing Co. v. Davis, 24 S. E. Rep. 365 (N. C.).

Lawrence v. Stonington Bank, 6 Conn. 528.

Commercial Bank v. Armstrong, 148 U. S. 50, 56.

Sweeney v. Easter, 1 Wall. 166, 173.

Barker v. Prentiss, 6 Mass. 430.

Josiah Morris & Co. v. Alabama Carbon Co., 36 Southern 764 (Ala.).

Bank of America v. Waydell, 92 N. Y. Supp. 666; s. c. affirmed, 187 N. Y. 115, 79 N. E. 857.

As in all cases of contract, the agreement of the parties must govern the transaction, and while in the case at bar this agreement is shown by the deposit tag used, a like stipulation on the fly leaf of a pass book similar to that on the deposit slip in the case at bar is sufficient to show that the bank was a collection agent merely.

In re State Bank, 57 N. W. Rep. (Minn.) 336.
Re Bank of Minnesota, 77 N. W. Rep. (Minn.) 796.

The form of indorsement of a check is not controlling. Instructions under which the check was received or under which it may have been forwarded for collection must control, and the true contract may be shown by a stranger to the transaction. This principle is alike applicable to the question of the right arising by the deposit of the Sugar Company with the La Grande Bank, as that also of the right in virtue of the deposit by the La Grande Bank with the Portland Bank.

Holmes v. First National Bank, 56 N. W. Rep. 1011.
Corbett v. Fetzer, 66 N. W. Rep. 417, 419.
Sloan v. Gibbs, 35 S. E. Rep. 408, 410.
Barker v. Prentiss, 6 Mass. 430.
Whitney v. Spearman, 70 N. W. Rep. 240.

These cases but illustrate a principle which is elemental, that as between the parties to a transaction, lack of consideration can always be shown.

(b) Even had the transaction been intended to pass title to the check so as to enable the La Grande Bank to claim as owner, no title in fact passed, because by the

acceptance of the check by the La Grande Bank, it being then insolvent and known to be insolvent by its managing agent, whose knowledge was that of the bank, and its insolvency being unknown to the Sugar Company, a fraud was perpetrated, and under such circumstances the true owner of the paper may reclaim his own as between the parties to the transaction; and more particularly may it be said he may cancel the agency for collection if he had delivered the paper for collection, especially if this check is drawn by him and in favor of himself.

Craigie v. Hadley, 99 N. Y. 131.

St. L. Ry. Co. v. Johnston, 133 U. S. 566, 576.

Wasson v. Hawkins, 59 Federal 233.

Somerville v. Beal, 49 Federal 790.

Richardson v. Olivier, 105 Fed. Rep. 277.

Richardson v. Continental Bank, 94 Fed. Rep. 450.

Re Stewart, 176 Fed. Rep. 463, 467.

Re Bank of Minnesota, 77 N. W. Rep. (Minn.) 796.

Evansville Bank v. Ger.-Amer. Bank, 155 U. S. 556, 562.

II.

The Portland Bank secured no better title to the check in question than that held by the La Grande Bank, notwithstanding the general indorsement of the check, because the Portland Bank was given notice of the infirmity of the title by the letter of the La Grande Bank inclosing the check in question and other items of paper "for collection and credit."

Bank of America v. Waydell, 92 N. Y. Supp. 666.

Josiah Morris & Co. v. Alabama Co., 36 Southern 764 (Ala.).

III.

The fact that the check bore a general indorsement sufficient to pass title is not controlling as between the Portland Bank and the La Grande Bank, which was a mere collecting agent for the Sugar Company; the true nature of the transaction may be shown by parol, as also it may be shown by contemporaneous instructions.

Barker v. Prentiss, 6 Tyng (Mass.) 430.

Holmes v. National Bank, 56 N. W. 1011 (Neb.).

Corbett v. Fitzer, 66 N. W. 417 (Neb.).

Whitney v. Spearman, 70 N. W. 240 (Neb.).

Sloan v. Gibbs, 35 S. E. 408 (S. C.).

IV.

Had the check in question been indorsed over to the Portland Bank "for collection and credit" or "for collection and remittance" there is no question but that the Portland Bank could take no title to the check as against the true owner, and under such circumstances the Portland Bank would have become a mere sub-agency for collection. A letter, however, transmitting a check bearing an unconditional indorsement "for collection and credit" has the same effect as if the indorsement of the check were conditional and for general collection and credit. In other words, the receiving bank becomes a collection agent merely under such circumstances.

Josiah Morris & Co. v. Alabama Co., 36 Southern 764 (Ala.).

Bank of America v. Waydell, 92 N. Y. Supp. 666.

V.

A check or draft indorsed "for collection and credit," or indorsed generally but forwarded for "collection and credit," means to credit after collection, not before; a credit before collection, therefore, is gratuitous and confers no right upon the receiving bank because of such credit.

Levi v. National Bank of Mo., 15 Fed. Cases, No. 8289; s. c. 5 Dillon 104.

1 Daniels Neg. Instruments, p. 309, sec. 333.

Armstrong v. Nat'l Bank, 14 S. W. Rep. (Ky.) 411, 412.

First Bank of Circleville v. Bank of Monroe, 33 Fed. Rep. 408, 411.

Evansville B'k v. Ger.-Amer. B'k, 155 U. S, 556, 562.

VI.

Because there is a custom of banks interchanging business whereby the receiving bank gives immediate credit to the forwarding bank upon the receipt of bankable paper exchanged in due course of banking business does not destroy the right of the real owner of the check when the crediting bank has notice by the instrument itself or otherwise that the instrument passes through banking channels "for collection."

Sweeney v. Easter, 1 Wall. 166, 173.

Bank of America v. Waydell, 92 N. Y. Supp. 666.

Armstrong v. National Bank, 14 S. W. 411 (Ky.).

Lawrence v. Stonington Bank, 6 Conn. 521, 529.

Com. Bank v. State Bank, 132 Iowa 706.

VII.

The Portland Bank, however, did not become unconditionally liable to the La Grande Bank for the check, since

it received it for "collection and credit." The fact that the Portland Bank had voluntarily given the La Grande Bank a provisional credit in advance of collection, whether in accordance with the custom of the two banks or otherwise, is immaterial. The check in question was payable at the Bank in Ogden, Utah, where likewise the check was drawn. The Portland Bank had no right to assume that the La Grande Bank was transacting business with this character of paper upon any different principle than it itself was handling such paper, and as the Portland Bank did not become unconditionally liable upon the check it cannot claim that title passed; and to justify this suit, title to the check must appear.

Scott v. Ocean Bank, 23 N. Y. 289.

Re Bank of Minnesota, 77 N. W. 796 (Minn.).

Armour Packing Co. v. Davis, 24 S. E. 365 (N. C.).

Re State Bank, 57 N. W. 336 (Minn.).

Armstrong v. National Bank, 14 S. W. 411 (Ky.).

Com. Bank v. State Bank, 132 Iowa 706, 109 N. W. 198.

VIII.

If it shall be assumed, however, that the Portland Bank became the purchaser of the check from the mere fact that having received it for collection and credit it permitted the La Grande Bank to draw against these provisional credits, which had been given for this and like character of paper, it could claim no more than the amount actually paid out on the drafts of the La Grande Bank against its credit; in other words, as there was a final balance with the Portland Bank to the credit of the La Grande Bank at the time of the cessation of business between them, arising by the

insolvency of the latter, the Portland Bank must be held as a trustee for the Sugar Company for this actual balance; this principle is especially applicable in the case at bar, which is an action on an uncollected check by one claiming to be a purchaser in good faith for value; in such cases such a purchaser can recover only what was paid for the check, viz.: What had been paid out on the La Grande Bank's drafts at the time of its failure; no recovery can be had for the benefit of the La Grande Bank.

Lawrence v. Stonington Bank, 6 Conn. 521, 526.
Braman v. Hess, 13 John. (N. Y.) 52.
Munn v. Commission Co., 15 John. (N. Y.) 44.

ARGUMENT

The action of the Portland Bank against the Sugar Company and its right to a judgment upon the check sued upon pre-supposes an ownership of the check, with right of action against the drawer for non-payment, and the discussion upon this question naturally suggests the manner and circumstances under which, if at all, the Portland Bank became such owner, which discussion raises two important questions, viz.: The nature of the transaction as between the Sugar Company and the La Grande Bank and the right as between the Sugar Company and the Portland Bank, and incidentally the relationship between the La Grande and Portland banks and the manner and circumstances under which the Portland Bank, if at all, acquired the right to the check.

I.

THE NATURE OF THE CONTRACT BETWEEN THE SUGAR COMPANY AND THE LA GRANDE BANK BY THE DEPOSIT BY THE SUGAR COMPANY OF ITS OWN CHECK WITH THE LA GRANDE BANK AND WHETHER TITLE PASSED TO LA GRANDE BANK BY REASON OF THE DEPOSIT.

When on October 6, 1908, the Sugar Company deposited with the La Grande Bank its own check drawn on an Ogden Bank, using for the purpose of the deposit a deposit slip of the La Grande Bank, by the direct terms of which La Grande Bank became a collection agency in behalf of the Sugar Company, one of two things happened, the La Grande Bank became the owner of the check or it did not. If it became such owner it must have been because of the fact that it purchased the check, or paid something of substantial value for it—it could not become owner and at the same time an agent for collection. While provisional credit was given to the Sugar Company for the amount of the check, such credit was a mere paper credit, never in fact resorted to by the Sugar Company, a resort to which it did not have the right under the very terms of the contract of deposit, because La Grande Bank in addition to stipulating that it received the check for collection merely and that all sub-agencies for collection were to be deemed the agents of the depositor, the bank expressly stipulated that the credit given in advance of collection by the fact of accepting the check for deposit, might at any time be cancelled, whether the check was or was not paid, this reserved right of cancelling credit to be exercised by the

La Grande Bank at any stage of the process of collection. Had the Sugar Company availed itself of the provisional credit, with the consent of the La Grande Bank and checked against the deposit, then another question would arise. The fact that at no time it availed itself of the provisional credit and that the Bank failed before collection, stamped the transaction as between the Sugar Company and the La Grande Bank as one of agency for collection merely. The mere crediting of the paper did not pass title for the very cogent reason that the credit was a paper one merely. The fiduciary relation of principal and agent once established must continue until the terms of the agency are complied with, or the agency cancelled, either by operation of law or the voluntary action of one or both of the parties; and in this case, by the deposit-slip stipulation, no right to substitute a debtor-creditor relation for that of agency could mature until there had been a reduction to possession by the La Grande Bank, or its sub-agents, of the funds collected on the check.

The fact, also, that at the time of the deposit in question, the La Grande Bank was insolvent, unbeknown to the Sugar Company, but known to the managing agents of the Bank, would prevent the La Grande Bank from being treated as owner of the check, for to accept of such a deposit under such circumstances is to perpetrate a deliberate fraud upon the depositor and would annul the intention, even though there were intention to pass title to the check, and a constructive trust would arise immediately as between the La Grande Bank and the Sugar Company. This trust would follow the *trust-res* so long as the *res* could be identified, unless the *res* came into the possession

of a *bona fide* holder for value and without notice, actual or constructive, of the special nature of the title. All the authorities support this view, and the apparent exceptions indicated in cases where actual money is deposited in an insolvent bank are quite properly explained upon the principle that the mingling of such money with other funds of the insolvent bank results in a loss of identity of the *trust-res* which can no longer be followed. So that if the question at issue here were one as between the Sugar Company on the one hand and the La Grande Bank, or its Receiver, upon the other, as to whether the Sugar Company could be compelled to pay the amount of its check to the La Grande Bank, or its Receiver, there can be no question as to what the result of the action would be, and extended citation or excerpts from opinions on this part of the discussion is an idle waste of time, both of court and counsel.

This naturally brings us to a discussion of the inquiry as to whether or not there has ever been a destruction of the trust character of the check upon its passing to the Portland Bank under the circumstances under which that bank received it; whether the drawer of a check drawn in favor of the drawer himself upon his own bank, puts it in banking channels for collection, may recall the power of collection he has conferred; whether the insolvency of the La Grande Bank did not operate *per se* to cancel the authority to collect, or has the Portland Bank become a purchaser and owner with a right of action against the drawer, either as drawer or indorser, and what is the extent of recovery? And these are the crucial questions in the case.

II.

THE PORTLAND BANK RECEIVED THE CHECK IN SUIT AS AN AGENT OF THE LA GRANDE BANK "FOR COLLECTION AND CREDIT," WHICH MEANS CREDIT AFTER COLLECTION; TO JUSTIFY THIS ACTION MEANS THAT SUCH AN AGENT MAY OF HIS OWN VOLITION CHANGE HIS RELATIONSHIP TO THAT OF OWNER—IN OTHER WORDS, SUBSTITUTE A DEBTOR-CREDITOR RELATIONSHIP TO THE LA GRANDE BANK IN LIEU OF THAT OF AGENCY; AND THIS IS TO BE BROUGHT ABOUT, IT IS SAID, IN RESPECT TO A CHECK SECURED BY THE FRAUD OF ITS PRINCIPAL, LA GRANDE BANK, A PAPER LIKEWISE WHICH THAT BANK HAD IN FACT RECEIVED FOR COLLECTION MERELY, AND UPON WHICH WHEN IT STARTED UPON ITS ROUNDS FOR COLLECTION WAS IMPRESSED A TRUST IN FAVOR OF THE DRAWER.

The Portland Bank claims in effect to be a *bona fide* holder for value of the check in suit without notice of the infirmity of title of its principal. It claims this because it contends that having given a provisional credit to the La Grande Bank for the amount of the check in advance of collection—a voluntary credit made without obligation to make it, or to continue it, and with right to recall it at any time—it honored drafts of the La Grande Bank against the provisional credits it was securing from time to time by reason of its deposits. It contends for this in respect to a check originally coming into the hands of its correspondent for collection merely, and at a time when the taking of the check by its correspondent operated as a

fraud upon the drawer. This means that, notwithstanding the fact that it originally received the check distinctly as agent and for collection merely, it may substitute a debtor-creditor relation with the La Grande Bank for that of agency, as does the principle contended for mean also that the nature of the transaction was such that it could not know that the check was being held by the La Grande Bank itself for collection.

The salient facts of the case, as disclosed by the findings, should be remembered when analyzing this contention. They are these:

The two banks in question were in the habit of exchanging business one with the other. They are what is known in common banking parlance as banking correspondents. This relationship between them was established in the Fall of 1907, and while there was some correspondence between the two when the business relationship was established, there is nothing which indicated the terms upon which the relationship should be maintained or how the respective business between them should be handled, and in one sense the La Grande Bank was a depositor with the Portland Bank; each, however, was in the habit of collecting for the other bankable paper sent by the one to the other for that purpose. For convenience each credited the other's account with bankable paper thus exchanged for collection between them; quite naturally the remittances of the La Grande Bank were larger, since money finds its way always to business centers. There was no special contract between the two banks, however, that each should give credit to the other in advance of collection of the respective paper interchanged. The check in question was drawn in

Ogden by a drawer unknown to the Portland Bank; it bore an indorsement, however, direct to the La Grande Bank, having been originally drawn payable to the drawer, but the Portland Bank had no right to assume that the La Grande Bank was transacting business as to such paper in any other or different way than it itself was handling such paper; on the morning of October 8, 1908, it received from the La Grande Bank the check in question, bearing the indorsement, "Pay to any bank or banker," but with a special letter notifying it that the check was sent "for collection and credit," which means, under the authorities cited, for credit after collection. It must have known from the character of the indorsement, the nature of the paper itself, the terms upon which it had been received and the well understood course of banks themselves in respect to such paper, that the check was going its rounds in process of collection for the account of someone, and since the Portland Bank itself was not handling such paper as owner when received from its depositors, it can hardly be expected that it had the right to assume that the La Grande Bank had received the paper as owner, and its subsequent course in respect to the check in forwarding it for collection clearly indicates that it must have known, as all the intermediary banks through whose hands it passed likewise knew, that it was paper which was being handled for collection, and undoubtedly for the benefit of the drawer; under the letter of instructions accompanying the check, the Portland Bank, upon its receipt, became immediately an agent for collection, because, while the indorsement upon the check was general, this indorsement is not controlling, and while such indorse-

ment would have enabled the Portland Bank to have sold the check and pass title to someone who did not know it was out for collection and credit, the fact that the letter forwarding the check showed it to be for collection and credit was controlling so far as the Portland Bank was concerned, and at once stamped the transaction as between the two banks as one of principal and agent. On receipt of the check the Portland Bank credited the La Grande Bank with the amount of it, but without any prearranged understanding between the two banks that this credit should be given, and undoubtedly this provisional credit could have been cancelled at any time; it made no particular advances on this check. It followed the course it had usually followed in such cases, viz.: Permitted drafts against the deposit account of its depositor, but it did so necessarily, not upon the character of any particular paper which it had received by way of deposit, but rather upon the financial standing of its depositor and for the convenience of the business between the two banks which was being handled. At the time of the receipt of this check, also, the Portland Bank was using a deposit slip for its general depositors, by the terms of which checks upon out-of-town banks (meaning banks out of Portland) were handled under terms of no responsibility in the Portland Bank until the funds collected had actually been received, and in effect there were the same provisions on the deposit tags used by the Portland Bank as appear on the deposit slips used by the La Grande Bank in respect to cancelling at any time provisional credits which might be given for "out-of-town" collections, and while the particular deposit slip in use at the Portland Bank was not used by the

La Grande Bank in making its deposits, the value of the deposit slip of the Portland Bank will be found in the evidence which it furnishes, showing its own custom and course of business in handling out-of-town checks, and probably the course of business of other banks as to such paper; and independent of the effect of the use of such a deposit slip, it goes without saying that a banker having received from his depositor a check for collection, and having given depositor credit for the amount of such check, without any obligation so to do, may at any time charge off the credit. As showing the knowledge of the purpose of the forwarding to and receipt of the check by the Portland Bank, the facts found disclose that the Portland bank immediately forwarded the check to McCornick & Company at Salt Lake City, Utah, with the general indorsement, unnecessary so far as the Portland Bank was concerned, of "Pay to any bank or banker," but with a letter stating that the check was sent for "collection and credit," and charged the Salt Lake Bank accordingly on its books; the Salt Lake Bank, in its turn, made the same indorsement and forwarded the check to Ogden, with a letter stating that it was sent for "collection and credit," and the check, not being paid, was returned through the Salt Lake Bank to the Portland Bank, debit being made against the intermediate forwarders to offset the book credits therefor.

Now, under this state of facts it is contended in behalf of the Sugar Company, the drawer of the check:

That all of the circumstances surrounding the transactions show that the check in question, drawn in Ogden on a bank in Ogden and starting originally on its course for collection at La Grande, was cut for collection for the account of some

one and had not been bought and paid for in the open market.

That the Portland Bank was an agent for collection and in effect a sub-agent of the original bank which had received the check, and that it could not of its own volition, by the mere fact of a provisional credit given for the check, revocable at any time, and by the mere fact that it voluntarily permitted drafts against the account of the depositor who deposited the check, become a bona fide holder and substitute for its position as agent for collection, the debtor-creditor relation with the depositor from whom it had received the check, and claim ownership with right of action thereon.

When the La Grande Bank forwarded the check in question to the Portland Bank, the relation established thereby between the two banks was either that of debtor and creditor or an agency for collection purposes. It could not be both, because the two positions are inconsistent—the one implying an agency to collect for another, the other implying an absolute ownership as principal holder.

If the latter, it is important to inquire when ownership arose in its own right and how long it continued as such owner? Its position originally was that of agent for collection because, as will be seen by the authorities cited, this relationship of agency may be established by a direct agreement or stipulation, or by tacit understanding, and had the check been indorsed direct to the Portland Bank by the La Grande Bank, but indorsed "for collection and credit," the Portland Bank would not only have become a direct agent for collection, but the character of the indorsement would have prevented the Portland Bank from transferring title to anyone else as against the true owner, or as against the drawer. Instead of such an indorsement,

however, there was a general indorsement, but with a special letter of instructions, and, as the authorities say, the character in which a bank holds paper may be determined not only by the paper itself and by the indorsements upon it, but by contemporaneous instructions as well, oral or written, touching the terms upon which it has to receive the paper. Now, with this original position of agent for collection, when and by what authority can it be said that that relationship was changed or converted into one of debtor-creditor to La Grande Bank? To concede ownership in the Portland Bank it must be said that it got title from someone else who was owner, or who had the right to pass ownership to it, and could it become the owner and thus secure a right to enforce payment of the check by voluntarily giving a provisional credit to its depositor, which credit could at any time be cancelled, and with such a provisional credit did it give anything for the check? And since it received the check for "collection and credit," which means credit after collection, how can it of its own motion become at once the buyer of the paper, so to speak, and by what authority can it substitute for its position of agency that of debtor-creditor? If it became the owner by giving a provisional credit to its depositor, then it means that a bank may juggle with the paper which it receives for collection, treating itself as a collector merely, or as owner, as its own interests may seem to call for. Under the authorities cited, if a bank holds itself out to another bank, or to a person, as an agency for collection and upon the receipt of a check, or other bankable paper, refuses to assume liability therefor, it cannot allow a credit at once and consider that credit as one which shall act as a purchase of the paper while still insisting upon the right to

withdraw the credit if the check prove bad; *a fortiorari,* must this be so in the case at bar, where the banker reserves the right to cancel this provisional credit at any time, even before it should be determined whether the check is good or bad. In other words, responsibility for the check is a necessary incident of ownership, and to hold that the bank may be both a collection agent and also owner is palpably absurd.

If the Portland Bank became the owner of the check when it gave the provisional credit therefor to the La Grande Bank, did it part with the ownership when it charged its Salt Lake correspondent with the amount of the check and forwarded it there for collection and credit? Logically, if the position of the Portland Bank is well taken this is the effect of this juggle of book credits and debits; and yet let us suppose that after the check reached the Salt Lake Bank that Bank had failed, who is the owner of the check and who could assert a right of action thereon?

Better still, the check in question was received by the Portland Bank on the morning of October 8th. Let us suppose, now, that instead of being forwarded to Salt Lake the check had been retained by the bank itself, and the La Grande Bank having been credited therewith, the Portland Bank failed, the check still appearing among its assets, who is the owner of the check, with right of action for enforcement?

In this discussion of the whole question as between the Sugar Company and the Portland Bank it must never be overlooked:

That the sole question is whether or not a check once put

out for collection, with authority to collect, may be recalled by the owner and the authority to collect cancelled;

And not a question of the right of a collecting bank to apply the proceeds of a collected check as between the collecting bank and an antecedent bank from whom the check may have been received for collection.

It is the failure to recognize the distinction between the right of a banker, who having received a check or draft for collection, collects it and undertakes to apply the funds received on collection to some overdraft of the immediate bank from whom the check was received, and the right of such a banker to sue for a dishonored check, as the owner of it, because forsooth for his own convenience and in reliance upon the financial integrity of the immediate bank from whom he has received such paper for collection he has permitted overdrafts by such immediate bank, that there is apparent conflict between the cases cited in this brief and those cited in support of this judgment.

As well illustrating the doctrine that the deposit of a check or draft for collection imports an agency merely, with all the attributes of the law of principal and agent, and does not import ownership; that the purpose of deposit may be shown by tacit understanding or direct instruction and authority, and that the giving of credit for the deposit does not change the relation or convert the transaction into one of sale and ownership the doctrine of

Armour Co. v. Davis, 24 S. E. Rep. (N. C.) 365,

is well in point. While the facts of the case are not made so plainly to appear as might be desired, it may well be inferred that a check had found its way into an insolvent bank and the true owner, whether a depositor of that bank

or not is uncertain, sought, by replevin or bill in equity against the receiver of the insolvent bank, the recovery of possession of the check. The check bore a general indorsement, but by a tacit understanding arising by a long course of business the paper had been actually received for collection, and remained uncollected. The court said, page 365:

> "Had the paper, when deposited by the plaintiff in the bank, been indorsed 'for collection' there can be no question that it would have remained the property of the depositor, for the title would not have passed. Had the paper been collected, and the proceeds mingled with the general funds of the bank, even if the paper had been indorsed 'for collection,' the plaintiff would have been a simple contract creditor, with no preference over other creditors. (This last conclusion, however, is not without much authority against it.) The point here presented is different from either of the above, and has elicited some conflict of decision; but it seems now settled, by the weigth of authority, especially the more recent cases, and it is in accordance with the 'reason of the thing,' that, while an indorsement 'for collection' of a draft or check does not transfer title to the indorsee, but merely constitutes him the agent of the indorser, a different result does not follow an unrestricted indorsement where, though the indorser is credited and the indorsee charged with the amount of such paper, it appears, as a fact, that the indorsee does not become unconditionally responsible for such amount until the check or draft is actually paid. (Citing cases.) * * * * Neither is it conclusive upon the question of ownership of the paper, that, before collection, the amount of it is credited to the customer's account, against which he has the privilege of drawing by check. * * * * Such privilege is merely gratuitous, if the bank may cancel the credit or charge back the paper to the customer's account when it is not paid by the maker or drawee. (Citing cases.) And in a late case in the United States Circuit Court of Appeals (Beal v. Somerville, 50 Fed. Rep. 647) the same principle is affirmed, the court pointing out that, though the amount of the paper may be at once placed to the credit of the depositor, with permission to him to draw

against it, yet, if the tacit understanding, from the course of dealings between the parties, is that, if the paper is not paid, the amount thereof is to be charged back to the depositor's account, this is really a bailment for collection, and as between the depositor and the bank the title never passed, it having passed *sub modo* only as between the bank and the payee. As between the depositor and the bank, the question whether title passes or not depends upon whether, as a matter of fact, the paper was taken for collection, though not so restricted by indorsement to that effect, or whether it was taken absolutely as a purchase or discount. * *"

"In the present case it is found that *the tacit agreement between the parties from their course of dealings* was that, although the amount was credited to the depositor and he could draw against it, yet if the paper so deposited was not paid on presentation the amount thereof was to be charged up to the depositor's account or taken off his next deposit ticket. This stamps the transaction as being unmistakably a bailment for collection."

Somewhat analogous to the above case is the following:

In re State Bank, 57 N. W. Rep. 336 (Minn.).

The relations of the parties in this case were not unlike those existing between the Sugar Company and the La Grande Bank. Drafts had been deposited with the State Bank of Minnesota and before collection the bank failed, whereupon payment of the drafts was stopped. A credit had been given to the depositors to the amount of the drafts, and petitions were filed to compel the Receiver of the State Bank to surrender drafts; the drafts had been unconditionally indorsed. The court said:

"It might, at first sight, strike many that the fact that the indorsements of the petitioners were unrestricted, and that the amount of the drafts was placed to their credit, with a privilege of drawing against it by check, would be conclusive that the drafts immediately became the property of the bank; but we are satisfied that upon both principle and authority there

is no hard and fast rule on the subject. * * * * The question is one of the agreement of the parties, either express or implied, from the general course of business between them. There can be no doubt that if a draft or other paper is delivered to a bank for collection, the mere fact that the indorsement of the owner is unrestricted, will not, as between him and the bank, make the latter the owner of the property. Neither is it conclusive upon the question of ownership of the paper that before collection the amount of it is credited to the customer's account, against which he has the privilege of drawing by check. It has been frequently held, with the approval of the best text writers, that if paper is delivered by a customer to a bank for collection, or for 'collection and credit,' a credit of the amount to the customer before and in anticipation of collection will be deemed merely provisional, and the privilege of drawing against it merely gratuitous, and that the bank may cancel the credit, or charge back the paper to the customer's account, if it is not paid by the maker or drawee. (Citing cases.) The right of banks to do this in case of the deposit of checks on other banks, without any special contract, is generally exercised and recognized. This is inconsistent with the idea that the title to the checks passes absolutely to the bank, and is only consistent with the theory that the bank is the agent of the customer for collection, notwithstanding the credit to the latter."

These cases bear with peculiar force in the case at bar when it is remembered that the Portland Bank was reserving the right with all of its depositors of "out-of-town" checks to charge back the same at any time before presentation, as well as after presentation and non-payment, and the doctrine of these and other like cases cited on the brief seem to be well-founded in principle, for it is not conceived upon what theory a bank may consider itself as owner and yet expect someone else to stand the loss in the event of non-payment. Any other doctrine must mean that banks may as between themselves establish a custom

whereby they may secure to themselves all of the benefits of agency or ownership, as the necessity of a particular transaction may call for, and avoid all liability, while the depositor must assume the double risk of creditor and principal—a doctrine which ought to call for cogent authority not yet appearing in the cited cases.

THE PHRASES "COLLECTION AND CREDIT," "COLLECT AND REMIT," "COLLECT AND CREDIT," "COLLECT FOR THE ACCOUNT OF,"—THEIR MEANING AS USED IN THE LAW OF BANKING—AND BEING USED CONSTITUTE A WARNING THAT, CONTRARY TO THE PURPOSE OF A GENERAL OR BLANK INDORSEMENT, OWNERSHIP IS NOT INTENDED OF THE PAPER OR ITS PROCEEDS, BUT CONSTITUTE A WITHDRAWAL OF THE PAPER FROM CIRCULATION FOR OWNERSHIP.

It was contended in the court below, and will doubtless be contended here, that although the Portland Bank received the paper in question "for collection and credit" that this means credit at any time.

This contention is unsound. There can be no mysterious meaning found in the phrase "collection and credit" or the synonymous phrases in lieu thereof. Such words import a plain meaning, and if they mean anything at all they mean that the receiving bank is to be the collector or cause the check to be collected through the ordinary banking channels, and when collected that a debtor-creditor relationship arises; that pending credit the trust attaching to the *res* continues; that credit in advance of collection cannot be given so as to destroy the *res* or the trust attaching thereto, and that credit can be given after col-

lection only, which, when given, destroys the identity of the proceeds of collection.

The case at bar imports but one thing, and that is that the paper in question was out for collection for the account of some one, and that some one undoubtedly the drawer of the check; that ownership of the check could not pass, and it is a juggle of words merely to impose any other interpretation on the transaction, and so the cases say:

Armstrong v. National Bank, 14 S. W. Rep. (Ky.) 411, 412.

In this case the court, referring to the phrases, says (page 412):

> "Whatever other difference in meaning of the two phrases there may be, both convey the idea that the party giving is owner and the one receiving the instruction is agent. * * * * It is well settled that where a bank receives a draft or note for 'collection on account,' or, what is the same, 'collection and credit,' it does not owe the amount until collected; and though credit be given therefor prior to collection, the bank is not precluded from cancelling such credit, which is regarded as merely provisional if the paper is dishonored. It would, therefore, seem just and reasonable, even if there was no authority to support the position, that if the bank does not in such case owe the amount before it is actually collected, it should not be held to have any other right to it than as agent, and that if not bound by an entry of credit it should not have power to bind the real owner thereby. It has, however, been distinctly, and we think correctly, held that a holder of paper who delivers it to a bank for collection and credit is at liberty to treat the bank as an agent until the proceeds are collected by the bank in money, *and that authority of the bank to credit the customer does not arise until he has actually received the money.* (Citing cases). We, therefore, think collection of the draft by the Louisville Banking Company and entry of the amount to the

credit of the Fidelity Bank did not have the effect of investing the latter nor changing its relation to appellee, for a mere usage between banks whereby the collecting bank credits the transmitting bank with the amount collected, instead of remitting, is not alone sufficient to be set up against the real owner of notes or bills to deprive him of his right." (Citing cases).

First Bank of Circleville v. Bank of Monroe, 33 Federal 408, 411.

In this case it was said:

"Where, as was done in the present case, the customer had given instructions for 'collection and credit,' he merely expresses in terms what the law would imply if no instructions had been given. When paper is thus delivered to a banker for collection, with authority to pass the proceeds to the customer's account by a credit after they are collected; and he undertakes the duty of an agent for all the purposes of making the collection, he cannot terminate his responsibility as an agent until he has fully discharged it, *and has substituted in its place his unqualified obligation as a debtor.* Until the banker becomes a debtor, *and his obligation as such is complete and irrevocable*, he remains an agent merely; and until then he acquires no title to the proceeds of the paper beyond the banker's lien. It is not unusual for bankers to credit their customers with paper left with them for collection in advance of the actual receipt of the proceeds. Ordinarily this is a provisional credit only, made in anticipation that the paper will be promptly paid, and with the right to cancel the credit if the paper is dishonored."

In 5 *Cyc.* 501 (n. 51) the principle is emphasized as follows:

"Among the most general forms of instructions are those to 'collect and remit,' and to 'collect and credit.' Whatever difference there may be in the meaning of these phrases, both convey the idea that the indorser is the owner and intends to retain ownership, and that the one to whom the instruction is addressed is an agent."

Levi v. National Bank of Mo., 15 Fed. Cas. (No. 8289) 415, (5 Dillon 104).

This was a bill in equity to charge the receiver of a suspended bank with the proceeds of collection of a draft which had been sent for collection and credit. The receiving bank, instead of collecting in money, accepted a check upon another bank and surrendered the draft, and before collection of the check which it had accepted it went into the hands of a receiver in insolvency, and subsequently the receiver collected the check. The Court (Dillon, J.) said:

"The check was presented, but instead of payment being demanded and received, a certification of it was accepted. That was an act which did not bind the plaintiffs—for it was alike without their knowledge or authority. * * * * It could not operate to pay the bill of exchange for which the check was given, or in any manner vary the rights of the plaintiffs. * * * * I am, therefore, of opinion that the defendant bank remained the agent of the plaintiffs to collect the bill of exchange until the money was actually received. When the money was received, and not before, the agency of the defendant bank to collect terminated, and *its authority to credit the amount to the plaintiffs and to make itself an absolute debtor therefor would then arise, provided it was still a going concern;* but inasmuch as before it received the money it had failed, its agency to constitute itself a general creditor for the amount had ceased to exist. * * * *

"Against this view the defendant urges two objections. The first is thus stated in the defendant's printed argument:

"'The letter transmitting the draft was simply asking for credit. The words 'for collection and credit' mean 'credit.' While it is reasonable to suppose that the defendant bank would not give the credit until it was satisfied that it would obtain the money on the draft, yet the ultimate object of the plaintiffs being 'credit,' if they receive the credit, it matters not to them whether the defendant bank received the money or not; and as soon as the defendant bank was satisfied to give

the credit as requested, the plaintiffs' demand was complied with, whether the collection was ever made or not.'

"The argument is fallacious. *The words 'for collection and credit' do not mean that the credit shall be given until the money is collected.* And it does make a difference whether the defendant bank ever received the money or not."

1 *Daniel's Negotiable Instruments* 309 (§333):

"The collecting bank is not bound to pay the amount of a bill, note, or check placed in its hands for collection to the holder, until such amount is received, or would be received but for the default of itself or some agent for whose act it is responsible. It is frequently the case that for the accommodation of customers they are permitted to draw before, and in anticipation of, the reception of such amounts. But this habit is mere favor, and, though long continued, gives the customer no right to demand that it be done in any particular case. And although a bank according to its custom, put to its customer's credit the amount of a bill deposited for collection, deducting the proper discount, and he was thereafter entitled to draw upon it, it has been held in England that upon a subsequent failure of the bank before collection, the customer could recover the bills specifically, no title to the bank having passed; or that he could recover the amount from the assignees if the collection had been made."

Sweeney v. Easter, 1 Wall. 166, 174.

Here there had been an endorsement "for collection" and the question arose whether such an indorsement was restrictive and notice that such paper so indorsed was not the property of the banks through whose hands the paper passed; and whether evidence to this effect was admissible or tended to contradict the legal effect of the indorsement. The evidence was held admissible and in effect what the indorsement itself meant; the Court said:

"Nor does this testimony of the witness to the effect that Harris & Sons (occupying the place that the

La Grande Bank occupies in the case at bar) were not the owners of the paper and did not sell it to defendants, or intend to give them any lien on or title to the paper or its proceeds when collected, contradict or vary the legal import of this instrument. * * * * It rather explains the transaction in perfect conformity with the real meaning and effect of the indorsement. The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds. * * * The indorsement in the present case was not intended to give currency or circulation to the paper. Its effect was just the reverse. It prevented the further circulation of the paper, and its effect was limited to an authority to collect. No principle of public policy would be violated nor any fraud upon innocent holders of the paper would be perpetrated by permitting the parties who made that indorsement to testify to facts which are in perfect harmony with its language and its intent."

Now, if a receiving bank may not disregard such an endorsement of the paper itself, they are not permitted, of course, to disregard instructions to like effect accompanying a paper which bears a general endorsement, because it is uniformly held that such letters of instruction as between parties, in effect restrict the paper and stamps the transaction as for collection as if the endorsement itself had been restricted.

National Bank v. Hubbell, 22 N. E. Rep. 1031, 1033 (117 N. Y. 384).

In this case the facts as to method of dealing between the two banks were almost identical with those of the case at bar, and the plaintiff in the action occupied a position analogous to that of the Portland Bank. The paper had

been endorsed "for collection for account" and forwarded with like letters of instruction to those in the case at bar. And, among other things, a question arose as to whether book credits given for such paper changed the relation from that of agent for collection to that of purchaser and owner. The court said (page 1033) :

> "The defendant, Hubbell, as one defense to the claim of the plaintiff, insists that Wilkinson & Co., upon the receipt by them of the various checks and drafts or other pieces of paper payable on demand, and upon the crediting of the amounts thereof to the plaintiff upon their books, without waiting for the payment of the same, became the owners thereof, and that these facts amounted to a transfer of the title to the paper or its proceeds to Wilkinson & Co. In that, we think, he is mistaken. The indorsement upon each piece of paper was for collection simply, and by virtue of that indorsement no title passed to the firm; but, on the contrary, it became simply the agent of the plaintiff to present the paper, demand payment thereof and remit to it. Under such circumstances, the title to the paper remained in the party sending it. (Citing cases). *The letter accompanying the inclosures of paper amounted simply to a direction to credit after the collection was made, and up to the time that the funds were actually received by the firm it certainly could make no alteration in the law relative to indorsement for collection.* * * * * These pieces of paper were undoubtedly subject to the direction of the plaintiff at any time prior to their payment, and it would have been the duty of the firm to have obeyed such direction. The plaintiff could have withdrawn the paper, or made such other disposition of it as seemed to it proper. It might have been liable to pay the firm for the services performed by them; but that had no effect or bearing upon the title to the paper."

The defendant in the above case under review was an assignee of Wilkinson & Co., private bankers, to whom the plaintiff in that case had transmitted the paper, and the paper had been sent out by Wilkinson & Co. to intermediary

bankers in due course of business prior to their assignment. And evidently the paper had not been collected up to the time of the assignment, but returns being made after the assignment to the assignee, the controversy arose over proceeds of collection received in fact after assignment.

Bank of Clark County v. Gilman, 88 Sup. Ct. Reports 486, 402 (81 Hun.).

This was a case where the paper involved had been endorsed "For collection and credit of the Bank of Clarke County" by the Cashier of that Bank, and passed to Nicholson & Sons, who in turn endorsed it for collection for their account and sent it to Gilman, who in turn instead of presenting it to the National Bank of the Republic, upon which the check had been drawn, deposited it to their own credit with the Manhattan Company, endorsing the check "For deposit in the Manhattan Company, to credit of Gilman, Sons & Company." The Manhattan Company presented the check and it was paid and charged to the account of the maker, payment being made, however, after the failure of Nicholson & Sons. The controversy arose between the original bank drawing the check and Gilman. The Court said (page 491):

> "Such an indorsement is restrictive and notice to every subsequent custodian of the check that it remains the property of him who thus indorses." (Citing Bank v. Hubbell, *supra;* and Bank v. Armstrong, 148 U. S. 50). "It is said that the use of the word 'credit' in the indorsement changes the rule which would otherwise obtain. But this suggestion is disposed of by Bank v. Hubbell, *supra*. According to it the general rule of law applicable to paper transmitted 'for collection,' applies as well when the owner's agent is given authority to collect and credit, down to the point where the moneys shall have actually come into the hands of such agent."

The case held also in line with former cases cited that the insolvency of Nicholson & Sons operated *per se* to revoke the authority to collect. And while this agency for collection was created by the endorsement of the paper itself, such agency, as has been seen, may arise from collateral instructions accompanying such paper which carries a general endorsement.

In effect all of the cases say that paper endorsed for collection and credit or bearing a general endorsement but with collateral instructions for collection and credit is notice throughout to all of the banks into whose hands such paper comes that the collateral instructions follow the paper; that such paper is not intended to be given currency or circulation, as said in *Sweeney v. Easter*, but the effect is to prevent further circulation, and the transaction is limited to an authority to collect.

In the written opinion filed by the court below at the rendition of the judgment, it is stated that the endorsement of the check in suit being general, it is immaterial that there were accompanying letters of instructions to the Portland Bank that the paper was forwarded for collection and credit, and that the Sugar Company cannot now complain. It must be inferred from this that either the fact that the check was sent for collection and credit was immaterial or that that fact could not be shown by any means other than an endorsement on the check. With great deference, however, to the learned Judge below, this opinion, it is submitted, is contrary to the adjudicated cases; and to say that the fact that the paper was put out for collection and credit is immaterial is to assume the very question to be decided, and implies that the contract

under which the paper is sent out through banking channels shall not be enforced by the courts, or that such a contract can be shown only by endorsement instead of by endorsement and instructions; and,

Not a single case was cited on this question, either in the opinion or in the brief of opposing counsel, opposed to the doctrine of the cases cited in this brief.

HAS THE PORTLAND BANK BECOME A PURCHASER FOR VALUE AND CAN IT BECOME SUCH IN THE FACE OF THE CIRCUMSTANCES UNDER WHICH IT RECEIVED THE CHECK?

This question must be answered in the negative if it be conceded that an indorsement for "collection and credit" or a general indorsement with like collateral instructions, has the effect to withdraw the paper from circulation for purchase and ownership, creates a collection agency only and imports notice throughout until collected that the paper is being carried for collection purposes. But let us examine the matter from another view, independent of this question.

In the most favorable light for the Portland Bank its position is this:

It claims that conforming to a course of business which had been established between it and its correspondent, and having honored drafts of the La Grande Bank it became the owner of the check in suit because at the time of the failure of that bank the drafts of the insolvent bank had nearly absorbed its credits and that thereby the Portland Bank became a holder for value—the contention being that

it must be assumed that this constituted advances on the faith of the particular check in suit.

It is urged that this course of business has reached the dignity of a custom between the two banks, and although established doubtless for convenience and interchange of business between them, that this custom acted upon is equivalent to an advance on the particular check in question and amounts to a purchase of it, and that what was originally clearly the relation of principal and agent for collection, and clearly so intended, has now become converted into a debtor-creditor relation.

That any drafts were permitted on the faith of this particular check is without any support in the Findings, and the transaction, stripped of the fallacious contention made for the purposes of the case only, was clearly one where each side collected out of town checks in the course of their interchange of business and each credited the other with the remittances made and received between them for these purposes, and the permission to draw in anticipation of collection was a mere gratuity and a bookkeeping convenience only; and when the circumstances under which the business relationship was opened are scanned, as disclosed by the correspondence set out in the Findings of Fact, it will undoubtedly be found that this is the true explanation the so-called permission to draw. As there was no contract between them, the Portland Bank could at any time have refused to honor drafts in advance of collection, and quite clearly its course of business to permit drafts in advance of collection was because of its confidence in the integrity and standing of the La Grande Bank. And if this Court will carefully examine Exhibit "B" showing the state of the

account between the two banks from September 30, 1908, down to the close of the account (Printed Record pp. 29-30), it will be clearly seen that as a matter of fact each was forwarding to the other for collection bankable paper which each had received from its respective patrons; that the Portland Bank was undoubtedly honoring the drafts of the La Grande Bank in view of the confidence reposed therein, and that unknown checks or drafts of unknown drawers in no sense inspired the method in vogue of handling the business.

Indeed, the course of business was such that no matter how worthless the paper might be, or how unknown the drawers, credit would have been given just the same, which clearly indicates the matter to have been one of courtesy in business and faith in the forwarding bank's solvency. For bankers generally do not take paper of unknown drawers upon the faith that the paper is good and then look to the endorsers for security, and if it may be supposed that the check had passed from the La Grande Bank to some third bank bearing the endorsement of the La Grande Bank "Pay to any bank or banker" and came into the hands of the Portland Bank from the third bank without the third bank's endorsement, can it be for a moment presumed that the Portland Bank would have given the third bank absolute credit, and would upon non-payment look across to the La Grande Bank upon its responsibility as endorser? Of course not. The Portland Bank would at once have charged back the amount of the check to the third bank from whom it received it, and would not look beyond to claims it might have against endorsers. This clearly shows that provisional credit is gratuitous merely, and

this action not an inartistic method of taking recourse upon endorsers. In this connection, it should be borne in mind that the Portland Bank was using a deposit tag with limitations similar to that used by the La Grande Bank, and whether used by that bank or not in the course of the interchange of business, the use of it shows the customary dealing of the Portland Bank when taking out of town checks, and of the right being reserved at all times of cancelling provisional credits before presentation for collection even as well as after collection refused. The subsequent course of the check after it reached the hands of the Portland Bank is indicative of the nature of the whole transaction—all strongly supporting the view that the Portland Bank, independent of its specific instructions in this particular case, must have known that the paper was being handled by the La Grande Bank as a collection for the original depositor, and with such knowledge it would of course be manifestly improper to charge the Sugar Company with the payment of the check either as drawer or endorser.

Now in view of the doctrine of provisional credits and the non-obligation arising thereby, it is not in accordance with morals or good conscience that a receiving bank should be permitted to take the shifty position that it is an agent if the paper should prove uncollectible, and the owner if it should subsequently prove to be good. Much more unconscionable is it that as against the Sugar Company, the Portland Bank should now insist upon ownership with right of collection since it needs the proceeds of collection to square the account of the La Grande Bank, and yet say that if the balance on its books after deducting the provis-

ional credit arising from non-collection had been in favor of the La Grande Bank, it could in the event of a suit by the receiver of the La Grande Bank for the amount of this provisional credit avoid its liability because of agency. Such a position means, "Heads I win, and tails you lose." And no business ought to be so favored by the courts that in one event the bank must win and in another its adversary must lose. The only sound conclusion is that no system of book credits—this endless chain of book debits and credits —constitutes a payment for value and makes the Portland Bank in this instance the holder of the check for value as against the equities of the Sugar Company, while at the same time according the privilege to that bank, if it does not need the check, to say it holds it as agent only.

But whatever may be said in support of the contention of the Portland Bank upon this question, it is respectfully submitted:

That the authorities are uniform and without, so far as our investigation has gone, a dissenting opinion thereon, that in cases of uncollected paper, permission to draw, availed of, does not make the receiving bank a purchaser with right to substitute a debtor-creditor relation for that of agent for collection.

Josiah Morris & Co. v. Alabama Carbon Co., 36 So. Rep. (Ala.) 764.

In this case the drafts involved and their indorsement are not unlike the case at bar; unlike the case at bar, however, the drafts had been collected. The plaintiff in the case had drawn his draft upon another and sent it to the Commercial Bank of Selma, the draft being made payable

to the cashier of that bank. The letter inclosing the draft stated that it was inclosed "for collection and credit." The Commercial Bank, through its cashier, endorsed the draft unconditionally and sent it to the defendants, Josiah Morris & Company, who were private bankers, with a letter which stated that it was sent "for collection and credit." The draft was sent and received in the regular course of business between the two banks, and at the time it was received by the defendants the Bank of Selma was indebted to them for a considerable sum. *The draft was collected after insolvency of the forwarding bank which had originally received it for collection.* Morris & Co. were sued by the owner for the proceeds of collection which had been applied to the overdraft of the Selma Bank. The Court said (p. 765):

> "The plaintiff's draft having been drawn in favor of the cashier of the Commercial Bank of Selma merely for the purpose of enabling that bank to collect and apply the proceeds thereof to plaintiffs' credit did not have the effect to divest the plaintiff of its equitable ownership of the debt drawn for. That bank's indorsement of the draft to the defendants did not have such effect, since, *as shown by the letters of advice accompanying the drafts, it took the paper, not as a purchaser, but in the capacity of a collecting agent for the forwarding bank.* Williams v. Jones, 77 Ala. 294; Branch v. U. S. Nat. Bank, 50 Neb. 470 (S. C. 70 N. W. Rep. 34). The assignment of and the cessation of business by the Commercial Bank of Selma, occurring previous to the collection of the draft, *operated to terminate the agency of the bank, and to forestall whatever right defendants might, in the absence of those occurrences, have had to retain the proceeds of the draft as a payment on the debt due them by that bank,* and the plaintiff, as the equitable owner of those proceeds, had the right to recover therefor as for money had and received to its use."

trust attach so long as the *res* can be traced and followed, and may a power of collection once conferred be recalled? And like the decision of *Morris & Co. v. Alabama Carbon Co.,* insolvency, in effect, determines the power.

Bank of America v. Waydell, 92 N. Y. Supp. 666.

The facts in this case are not unlike the case at bar. Hasty & Sons had drawn a draft on the defendants payable at a future date to Ives & Sons, bankers, the draft being lodged with Ives & Sons for collection, who in turn forwarded the same to the plaintiff for "collection and credit." Ives & Sons had a deposit account with the plaintiff. The draft having been accepted by defendant, payment was refused upon its due date at the instance of the true owner, Ives & Sons having in the meantime failed, and at the time of their failure owing the plaintiff on current account. Plaintiff brought action against the payee of the draft, who had accepted, and the question arose as to whether the plaintiff was a holder for value. The indebtedness of Ives & Sons to the plaintiff arose as the indebtedness claimed to exist in this case from the La Grande bank to the Portland Bank, viz, on open current account and by reason of the exchange of banking business between them. The plaintiff, pending the due date of the draft, had endorsed the amount of the draft by way of credit on the indebtedness to it from Ives & Sons. *It will be noticed that in the case under review the draft had not been paid, and the contest arose as to the liability of the defendant Waydell upon his acceptance of the draft and the right of the plaintiff to sue and collect, the defendant Waydell having in the meantime been notified not to pay the draft.* The Court said:

"We deem it to be settled law that the legal effect of the transaction between Ives & Sons and the plaintiff was to make the latter the agent of the former for the purpose of the collection of this draft. The notice which accompanied the draft established beyond question the authority and right under which the bank held the draft. That was to collect and credit the account of Ives & Sons with the proceeds of the draft when collected. The bank (plaintiff) was authorized to present the draft to the drawees for acceptance. Having done that act and procured the acceptance, it could take no further steps, save to collect the draft when due, when it was authorized to credit the amount to Ives & Sons. In Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455, the following rule was established:

'Where persons in the business of banking and collecting send to their correspondents or agents, in the regular course of business of receiving and sending notes between them for collection for mutual account, business paper received from customers for collection, the agent or correspondent acquires no better title to it or to its proceeds than was owned by the one transmitting it, unless there is a bona fide purchase of it for value, or advances made upon it in good faith, without notice of any defect in the title.'

This rule is precise in its application to this case. Ives & Sons were not holders of the draft for value, but were mere agents for its collection. It was received by the bank, accompanied by a notice of the character of the title of Ives & Sons; and the bank, in express terms, was directed to collect and credit it. The bank's title was not higher than the title of Ives & Sons, and of such title the bank had notice, as matter of fact, in consequence of which its rights and obligations were measured by the title which it acquired."

Lawrence v. The Stonington Bank, 6 Conn. 521.

This was an action of *assumpsit* to recover of the defendant the avails of a certain inland bill of exchange, alleged to have been received by the defendants, for the use of the plaintiff. (It will be observed that the bill had been collected). It seems that a bill of exchange had been drawn

on certain payees, who were indebted to the plaintiffs, and this bill the plaintiffs endorsed by blank endorsement to Bank No. 1 for collection. Bank No. 1 again in turn endorsed by blank endorsement and sent to Bank No. 2 for collection. Bank No. 2 again in turn endorsed generally and sent to Bank No. 3, the defendants, for collection. Bank No. 2 failed, and thereafter Bank No. 3 collected the bill and undertook to apply the proceeds against the account of Bank No. 2. It was not known by Bank No. 3, the defendant, that the bill was the plaintiff's property nor that it was not the property of the immediate bank No. 2 from whom it had been received, except so far as it might be inferred from the endorsement and a letter from the Cashier of Bank No. 2 informing the defendant, Bank No. 3, that the bill had been transmitted for collection. Custom or usage had, for a long time, existed in the banks of the City and State of New York of transmitting bills of exchange and promissory notes from each to the other for collection, and when paid of passing them to the credit of the bank so transmitting them and to the debit of the bank so receiving them in their accounts with each other. All of the above facts touching the transaction, and which in effect tended to explain the general endorsements on the bill, were proven by parol testimony, not as in the case at bar by contemporaneous letters. The Stonington Bank claimed a lien upon the proceeds of the collection of the bill, and claimed the right, having collected the draft, to mingle the proceeds with its own funds and apply upon the account of the bank from whom it had received the bill, under a general usage and course of business between the two banks. The plaintiff, the true owner of the bill,

had judgment below and the judgment was affirmed. The Court said (page 529):

> "The natural inquiry is, whether there has been a mode of dealing between the parties here, or a general usage and custom, that gives sanction to the asserted lien of the defendants in this case. No such mode of dealing has been proved, and no such usage; even if a mode of dealing and a usage between the banks, known only to themselves, and regulating their intercourse with each other, could avail to deprive a person of claims confided to them for collection. A man's property cannot thus be taken from him without his consent; and this assent cannot be implied, unless a usage has existed so long, and with such publicity, as to warrant the presumption that it was generally known.
>
> The custom of transmitting bills for collection from one bank to another, and crediting in account the avails received, whatever effect it may have between themselves, cannot affect the claims of a third person, who has confided the collection of a bill to one of them, without assent either express or implied, to the mode of transacting their business; and no such assent is inferable in this case."

Speaking of the relation of the various intermediary banks through whose hands the bill passed, the Court said, (pages 527 and 528):

> "All the endorsees were merely agents of the plaintiffs, for the collection and transmission of their money. * * * When the form of the transaction is removed, and it is viewed in its essence, the Eagle Bank (Bank No. 2) was merely the instrument of transmission, and the bill was virtually delivered to the defendants by the plaintiffs."

What the rights of the parties may have been had there been a collection of the paper in question we need not stop now to inquire, though the writer of this brief is of the opinion that the better doctrine is, and the one more in consonance with reason, (the cases however, are divided upon the question) that *where the collection has been made*

before insolvency, resulting necessarily in a loss to some one, the collecting bank becomes by virtue of collection an immediate debtor of the preceding bank from whom it has received the paper, with a right to commingle with its own funds the proceeds of collection; that the trust attaching to the *res* has been fulfilled; the *res* destroyed,—and it may apply such proceeds to any debt howsoever created from its immediate correspondent from whom it received the paper. On the other hand, if the collection be made after insolvency, a different question arises, a discussion of which now would be purely academic.

In the case at bar different questions arise, and restating them they are:

When the La Grande Bank received the check of the Sugar Company did a trust for collection attach to the res?

Does the fraud of the La Grande Bank in taking the check while insolvent create a trust in respect to the paper?

Does an indorsement for collection and credit or a general indorsement with instructions to collect and credit operate to withdraw the paper from circulation for purchase and ownership, and create an agency for collection merely, importing notice that the paper is out for collection merely and is not the subject of purchase and ownership until the paper is collected?

Do these trusts with which the paper was originally impressed attach to the res so long as the res is in existence, so that the paper can be followed and recovered by the true owner or payment be resisted if the owner is himself the drawer?

Can power of collection once conferred be revoked, and does not the insolvency of the original bank receiving the

paper for collection operate as a revocation of power of collection?

Do not the facts of the case, and the manner in which the check was handled after it reached the Portland Bank, clearly indicate that that bank is bound to know that the paper was out for collection by a customer of the La Grande Bank and was being handled by the Portland Bank accordingly?

Can a gratuitous credit given by the Portland Bank without obligation so to do, and given for convenience for the mutual interchange of business, so operate as that the trust against the res is destroyed, enabling the Portland Bank to claim as a purchaser for value if the check shall prove good, or treat the matter as agency if the check should prove bad?

Reasons of sound public policy and the protection to bank patrons, but with due regard to the banks themselves, call for but one answer to these questions and this answer should be, in the light of authority, that the Sugar Company cannot be held liable on its contract as drawer or indorser of the check in suit.

THE CASES CITED IN THE COURT BELOW IN BEHALF OF THE PORTLAND BANK, INCLUDING THOSE CITED BY THE LEARNED JUDGE WHO PRONOUNCED THE JUDGMENT, ARE NOT INCONSISTENT WITH THE ABOVE CASES, NOR ARE THEY AUTHORITY FOR THE CONTRARY CONTENTION MADE IN BEHALF OF THAT BANK, BECAUSE THEY ALL RELATE TO A SITUATION WHERE THE PAPER HAD EITHER BEEN COLLECTED AND THE RECEIVING BANK WAS FOLLOWING OUT THE AUTHORITY ORIGINALLY CONFERRED BY THE

DIRECTION TO COLLECT AND CREDIT, WHERE THE DOCTRINE OF LOSS OF IDENTITY OF THE RES AND COMMINGLING OF FUNDS INTERVENES TO PROTECT THE RECEIVING BANK AGAINST LIABILITY TO THE TRUE OWNER FOR THE PROCEEDS; OR,

THERE HAD BEEN A SPECIAL PURCHASE MADE WITH A SPECIAL ADVANCE AT THE TIME OF THE RECEIPT OF THE PAPER.

The cases cited in the opinion below are,

Hoffman v. The Bank, 46 N. J. Law 604.

The record in this case did not disclose that the paper involved had been received on deposit for collection, but the record affirmatively shows that it was intended that the receiving bank should become a debtor to the depositor, the bank having become unconditionally liable for the deposit.

Doppelt v. The Bank, 51 N. E. Rep. 753 (Ill.).

In this case neither by the endorsement of the paper, instructions touching the purpose of its receipt, or course of business, did it appear that the paper was received for collection, and in this particular case the depositor made use of the credit which he had received and checked against the paper—in other words, he received money for his paper.

Ayres v. Black, 79 Mo. 421.

This case was like the case from Illinois; the bank assumed unconditional liability on the paper deposited, which was an unconditional deposit and not for collection, and the credit received was at once used and *per se* the bank became at once the owner. Besides, the case shows a special agreement to exist with respect to the effect of such deposits, which were unconditional, under which the bank became the owner. (See page 422.)

Cody v. The City Nat'l Bank, 55 Mich. 379.

This was a case where there was no deposit for collection but the forwarding bank made special endorsement, and needing money asked special remittance from the

receiving bank by wire, which was immediately sent; clearly the case is not in point because the bank became immediately a purchaser and made special advances.

Metropolitan Bank v. New England Bank, 42 Howard (U. S.) 234.

The facts of this case are not so clearly given as that it can be considered authority for the question under consideration. Apparently, however, the collecting bank had no notice or instruction relating to collection, and quite clearly the paper involved had been collected, Taney, C. J., stating the question for decision as follows:

> "And the question is whether the plaintiff in error has a right to retain the proceeds of the notes then in its hands to cover the balance of amount due upon these transactions."

Continental Bank v. The Bank, 36 Southern Rep. (Miss.) 189.

In this case the collection had been made and the credit given and the receiving bank had merely complied with its instructions.

Miller v. The Bank, 30 Md. 392.

Vickery v. State Sav. Assoc'n, 21 Fed Rep. 773.

In both of these cases the collection was complete, the identity of the *res* had been destroyed by this fact, and the question involved was one of right to apply proceeds—not the question of power to collect, which is involved in the case at bar.

Wyman v. Colorado Nat'l Bank, 5 Colo. 30.

This is the nearest case in point cited in support of the judgment, and here there has been instructions to collect and credit *and payment of the paper had in fact been made*, but the money had not been actually received by the collecting bank, the same being then en route (the collection was a foreign collection). The controversy was one over proceeds of collection, not over the paper itself uncollected, and the depositor sought to reach the proceeds before they reached the hands of the collecting bank. The endorsement gave no infirmity to the paper itself, and the only

question involved was whether the collateral instructions from the forwarding bank to collect and credit, etc., were complied with. And the identity of the *res* being gone, the court very properly applied the rule that money en route to the collecting bank was practically in the hands of the collecting bank.

The above are all the cases cited by the Court below in support of its judgment, and the additional cases in behalf of the Portland Bank are equally distinguishable on like grounds. They are:

Garrison v. Union Trust Co., 102 N. W. Rep. 978 (Mich.).

Here there has been a collection, and the question involved was the right of application of proceeds, the case affirming that on collected paper the collecting bank in crediting the forwarding bank was following instructions, and in effect affirmed the right of the collecting bank to establish the debtor-creditor relation over proceeds of collected paper.

Metropolitan Bank v. Loyd, 90 N. Y. 530.

Here there was an express finding that the paper had not been received for collection.

American Exchange Bank v. Theummler, 62 N. E. Rep. 932 (Ill.).

Here the collection had been made, and the court affirmed the rule as to the right of the collecting bank to take the position of debtor and creditor relation upon proceeds of collection, the authority to collect and credit being fulfilled thereby.

Carroll v. Exchange Bank, 4 S. E. Rep. 440 (W. Va.).

Here the collections had been made.

Wilson v. Smith, 44 U. S. 763.

In this case the collection had been made, and the only true point decided (the case came up on a certificate of division from the judges of the court below) was whether

there was any privity between the true owner of a collected paper and the bank making the collection to entitle the former to bring action. And it was held that there was, affirming the familiar rule that a contract made between two parties for the benefit of another entitles the other to sue thereon.

III.

A JUDGMENT, HOWEVER, FOR THE FACE OF THE CHECK AND INTEREST CANNOT BE DEFENDED, BECAUSE THE PORTLAND BANK CAN RECOVER AT MOST WHAT WAS PAID FOR THE CHECK. THE CREDIT BALANCE, THEREFORE, OF THE LA GRANDE BANK WITH THE PORTLAND BANK BEING DEDUCTED, REPRESENTS WHAT WAS PAID FOR THE CHECK, ASSUMING THAT PROVISIONAL CREDIT AND PERMISSION TO DRAW, AVAILED OF, CONSTITUTE PURCHASE.

The La Grande Bank closed its doors at the close of business on Saturday, October 10, 1908, and did not again reopen. At the close of business on that day its credit balance with the Portland Bank, as found by the court, was $1839.01 (See Exhibit "B" Printed Record, page 28). On Monday, October 12, 1908, there was received and credited to the La Grande Bank $8387.22, while there was charged to the La Grande Bank against its drafts previously drawn $10216.38. This charge includes a collection item sent out to the La Grande Bank on October 12th of $134.14. It seems also that there was charged to the La Grande Bank a collection item of $232.38, sent out to that bank on October 10th. And by the adjustment of accounts

these two items have been returned to the Portland Bank, resulting in a net credit balance to the La Grande Bank aggregating $376.37, which was finally sent to the receiver of the La Grande Bank to close the account.

Now, in considering the question of what was paid through the medium of credits by the Portland Bank to the La Grande Bank for the account of the check in question, it is quite evident that the book debits and credits made after October 10th are clearly immaterial; more especially since presumptively at least if any credence at all is to be given to the credit side of the account as a basis for the debit side, the advances and charges after October 10th must have been made upon the strength of the credits entered after that date for paper received. And the true balance as of October 10, 1908, amounting, as stated, to $1839.01, constitutes the true credit against the amount of the check in suit to determine what was paid therefor. If, however, it can be said that the excess of debits over the credits arising after October 10th, constitutes an advance upon the check, then the true balance of credit is $376.37, which sum was thereafter remitted to the receiver of the La Grande Bank, and this sum can in no sense be said to have been paid for the account of the check in question.

That no recovery can be had in this case for the benefit of the La Grande Bank will not, we take it, be controverted, under the rule, too well understood for elaboration, that where less than the face value of an instrument is parted with by one advancing credit thereon a protection will be given only to the amount of the advancement. Further, if the custom be admitted of charging back on non-collection, and that this custom is the right of the

bank as against third parties, then it follows that had there been a balance in favor of the La Grande Bank sufficient to cover the amount of the check in suit, the Portland Bank must so charge back; but because this balance is less that the full amount does not justify failure to charge back as far as possible.

As the beneficiary of a trust in its favor by reason of the fraud of the La Grande Bank, the Sugar Company is entitled to all of the rights of the La Grande Bank as against the Portland Bank up to that amount which could be asserted as a preferred claim against the La Grande Bank, so that, in any view of the case it is clear that the amount of the judgment is erroneous.

In *Lawrence v. The Stonington Bank,* 6 Conn. 521, 526, the court says:

> "On the same principle, where the consideration is less than the amount of the bill or note no recovery can be had beyond the sum actually paid." (Citing cases.)

Respectfully submitted,

SNOW & McCAMANT,
Attorneys for Plaintiff in Error.

With them on the Brief:
GEORGE B. GUTHRIE.

No. 1905

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE AMALGAMATED SUGAR COMPANY A CORPORATION,

Plaintiff in Error

vs.

UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, A CORPORATION,

Defendant in Error

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT, DISTRICT OF OREGON

BRIEF FOR DEFENDANT IN ERROR

CHAMBERLAIN, THOMAS & KRAEMER,
Attorneys for Defendant in Error

LESTER W. HUMPHREYS,
On the Brief

BUSHONG & CO., PRINTERS, PORTLAND, OREGON

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BRIEF FOR DEFENDANT IN ERROR.

Following the suggestion made in brief of plaintiff in error, for convenience throughout this brief the plaintiff in error is designated as the Sugar Company, the defendant in error as the Portland Bank, and the Farmers & Traders National Bank of LaGrande as the LaGrande Bank.

The Sugar Company in its brief having stated quite fully the facts of the case, the Portland Bank will but

briefly refer to them. The Sugar Company is a Utah corporation, with a branch office at LaGrande, Oregon. This branch kept its account with the LaGrande Bank. On October ~~1st~~ 6, 1908, the Sugar Company deposited with the LaGrande Bank, a check for Four Thousand ($4,000.00) Dollars, drawn by the Sugar Company and payable to itself, which check was received by the LaGrande Bank, and the account of the Sugar Company credited with said amount. The check was endorsed by the Sugar Company when so deposited, as follows:

"Pay to the order of Farmers & Traders National Bank. Amalgamated Sugar Co. By H. M. Monson, Cashier."

Thereafter, and on the 6th day of October, 1908, the LaGrande Bank endorsed the check in question as follows:

"Pay to the order of any bank or banker. Farmers & Traders National Bank, LaGrande, Oregon, by J. W. Scriber, Cashier," and forwarded the same with said unrestricted endorsements to the Portland Bank for the purpose of deposit with the Portland Bank, and the crediting of the LaGrande Bank's account with said amount. This check was accompanied by other checks, all of them being transmitted by the LaGrande Bank to the Portland Bank in accord with their general course of business. Accompanying these checks was a letter reading as follows:

> "Farmers & Traders National Bank, LaGrande, Oregon, October 6th, 1908.

"United States National Bank, Portland, Oregon.
"Enclosed find for collection and credit.
"Respectfully, J. W. Scriber, Cashier.
"Protest all items over $10.00 unless otherwise instructed."

These checks were received by the Portland Bank on October 8th, 1908, and on that day the Portland Bank gave credit for the items in question, including the check in question, to the LaGrande Bank, entering a credit upon its books accordingly. Thereafter, and on October 8th, 1908, the Portland Bank forwarded to McCornick & Company, Bankers, at Salt Lake, Utah, the check in question, and thereafter, McCornick & Company received the check and gave credit on its books to the Portland Bank, and on the date of its receipt, forwarded it to the First National Bank of Ogden, Utah, for credit. The LaGrande Bank having closed its doors, the Sugar Company notified the First National Bank of Ogden not to pay said check and the same was thereupon returned to McCornick & Company. McCornick & Company then charged back said check and returned it to the Portland Bank. In the meantime, the Portland Bank had paid out the full amount of said check by drafts upon it from the LaGrande Bank, and prior to the time of any knowledge on the part of the Portland Bank of the closing of the LaGrande Bank, it had paid out a much greater amount than the amount of said check, and at the close of business on the 12th day of October, 1908, it had on hand only the sum of $9.85. The Portland Bank had no notice or knowledge of the character of deposit tag used by the Sugar Company in making its deposit with the LaGrande Bank. The Port-

land Bank had no knowledge of the insolvency of the LaGrande Bank at the time of the receipt of said check or of the payments made by reason thereof, and acquired said check as a holder in due course and for value, and became the absolute owner thereof, and the Court below found that the Portland Bank had the right to treat the LaGrande Bank as the owner of the check because of the unrestricted endorsement of the Sugar Company, and to pay the drafts of the LaGrande Bank on the faith of such ownership, and having made advances thereon to the amount of the check in good faith, without knowledge of the Sugar Company's title, the Portland Bank was entitled to collect the amount of the check.

POINTS AND AUTHORITIES.

I.

The Portland Bank, without notice of the deposit tag used by the Sugar Company, having paid drafts of the LaGrande Bank on the faith of said check, is a holder in due course and entitled to recover.

II Morse Banks & Banking (4th ed.), pp. 961-2, Secs. 573, 575, 591 to 598;
Daniel Neg. Inst. (3rd ed.), Secs. 336 to 340.
Continental Bank v. Bank (1904), 84 Miss. 103, 36 So. 189;
Garrison v. Trust Company (1905), 139 Mich. 392, 102 N. W. 978;
Cody v. Bank (1884), 55 Mich. 380, 21 N. W. 373;
Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234, 6 How (U. S.) 212, 12 L. Ed. 409;
Metropolitan Bank v. Loyd, 90 N. Y. 530;
Wyman v. State National Bank, 5 Colo. 30;

Dappelt v. National Bank (1898), 175 Ill. 432, 51 N. E. 753;
American Exch. Bank v. Theummler (1902), 195 Ill. 90, 62 N. E. 932;
Carroll v. Exchange Bank, 30 W. Va. 518, 4 S. E. 410;
Cragie v. Hadley, 99 N. Y. 133;
Bank of the Republic v. Millard, 10 Wall. 155;
Burton v. United States, 196 U. S. 282;
Vietrey v. State Savings Ass'n, 21 Fed. 773;
Miller v. Farmers & Mer. Bk., 30 Md. 392;
Ayres v. Farmers & Mchts. Bk., 79 Mo. 421;
Winfield Nat. Bk. v. McWilliams, 9 Okla. 493;
First Nat. Bk. of Clarion v. Gregg, 79 Pa. 381;
Friberg v. Cox, 37 S. W. 283 (Tenn. 1896);
Wood v. Boylston Nat. Bk., 129 Mass. 358;
Rathbone v. Sanders, 9 Ind. 217;
City of Somerville v. Beal Rec., 19 Fed. 790;
1 Morse on Banks and Banking, Sec. 186 (3d ed.);
Wasson v. Laint, 120 Ind. 578;
First Nat. Bk. of Ft. Collins v. Hughes, 46 P. 272 (Cal. 1896);
Matlock v. Scheuerman, 51 Or. 49.

II.

The Portland Bank had the right to rely on the unrestricted endorsement of the Sugar Company as passing title to the check to the LaGrande Bank. Cases supra.

III

The fact that the LaGrande Bank forwarded the check along with a letter which said "for collection and credit," was no notice that the forwarding bank was a collection agent as to the check. Cases supra.

IV.

The insolvency of the LaGrande Bank, though known

to its officers at the time of the deposit, will not defeat recovery by a holder in due course, who, without notice of such insolvency, advanced money on the faith of paper forwarded by the insolvent bank.

Hoffman v. National Bank, 46 N. J. Law, 605;
New York Brew Co. v. Higgins (1894), 79 Hun 251;
Cody v. Bank, 55 Mich. 380;
Bank of Metropolis v. New Eng. Bank, 6 How. (U. S.) 212, 12 L. Ed. 409;
Wilson v. Smith, 44 U. S. 763;
Continental Bank v. Bank (1904), 84 Miss. 103;
Sweeney v. Easter, 68 U. S. 166 (1 Wall.).

ARGUMENT.

I.

The Portland Bank is a holder in due course. The Sugar Company contends against this for two reasons: First, that the check was received by the LaGrande Bank and forwarded by it for collection; and, second, for the reason that the LaGrande Bank was insolvent at the time of the receipt of the check.

The deposit tag used by the LaGrande Bank was one which apparently contemplated the crediting as cash of any checks deposited by the depositor, and did not contemplate that the checks were merely deposited for collection purposes, as the conditions printed upon the deposit slip provided that credits or remittances made by the bank on account of any checks so deposited were subject to revocation until the bank had received actual, final payment, thus clearly indicating that the bank intended to credit as cash such checks so de-

posited, with the right to charge the same back in the event that the checks should not be paid. However, if this tag should be construed as a deposit for collection purposes only, the Portland Bank had no notice of the same. The Sugar Company deposited the check with a general unrestricted endorsement. The check was drawn on a bank in Utah, and the Sugar Company knew that in the ordinary course of business the check bearing its general unrestricted endorsement would pass through several holders before reaching the paying bank.

> Morse states the rule thus (II Morse Banks & Banking, p. 961):
>
> "If paper is deposited for collection, but not so marked, and is forwarded by the depository to a correspondent and by the latter received without notice of the true ownership and the depository receives advances on the faith of such paper * * * such paper cannot be recovered from the correspondent by the true owner. The bank is holder for value."

See also Sections 591 to 603 of the same work for a more extended discussion of the doctrine and authorities.

> Daniel on Negotiable Instruments (3d Ed.), Secs. 336-340, considers the same question. He says: Sec. 340: "But the views of the United States Supreme Court seem to us to embody the true logic of the question. The bank transmitting the paper endorsed in blank is ostensibly its owner. * * * It would seem to be in controvention of the universally recognized principles which control the negotiation of commercial paper, to permit a third party, who had declared by his form of endorsement that he had parted with title, to

> come in and assert it. If he chooses not to adopt the well-known form of endorsement—'for collection'—he should not be permitted to deny, against the bank which has collected the paper, the legal effect of that form of endorsement which he chose to adopt."

The case of Continental National Bank of Memphis v. First National Bank, decided in March, 1904, 84 Miss. 103; 36 So. 189; 2 A. & E. Ann. Cas. 116, is very similar to the case at bar. The forwarding bank (American National) was insolvent when it received checks sent to it for "collection and remittance," but bearing blank endorsements. It forwarded the checks with like endorsements to First National Bank, also for "collection and remittance." The insolvency of the American National became known while the money was in the hands of the First National. The latter bank, on learning of the failure, credited the amounts of the checks against the balance due it from the insolvent bank. Plaintiff, which had forwarded the checks to the insolvent bank, brought suit. The Court said:

> "After careful consideration and review of the legal principles applicable, our conclusion is: Where a bank forwards checks for collection under a general endorsement in blank, the title to such collection as to third parties dealing without notice, and not being put upon inquiry, passes to the bank to which they are forwarded, and the initial bank becomes simply a general creditor of the bank to which the items are sent for collection."

The principle where a bank forwards checks as here indicated is not different where a person makes a de-

posit "for collection, under a general endorsement in blank," just as defendant did in the case at bar. The depositor here stands in the place of the initial bank. Continuing, the Mississippi Court said:

> "So where in turn the second bank sends such items under a like endorsement in blank to its correspondent for collection, the same relationship is established between them. * * * The collecting bank is not required to make any inquiry to ascertain who, in point of fact, is the real owner of the proceeds of the collection, where the items for collection are received under a general endorsement. It has the right to assume that the ownership is in the bank forwarding the item to it. * * * The possession of the checks by the American National Bank under a blank endorsement was presumptive evidence of its ownership and appellee * * * had the right to consider the checks as the property of the American National Bank."

In the case of Metropolitan Bank v. Loyd, 90 N. Y. 530, Loyd drew a check payable to Murray. Murray deposited the check, endorsed in blank, in the M. & M. Bank. This bank credited the amount to Murray, and forwarded the check to the Metropolitan Bank, which credited the M. & M. Bank and presented the check to the drawee bank, where Loyd had stopped payment. Loyd sought to prove the insolvency of the M. & M. Bank when the deposit was made, and alleged that Murray deposited the check merely for collection. The Court said:

> "Where the owner of a check delivers it to a bank and it is accepted by it, and the bank gives

him credit on his passbook for the amount, and he accepts it, the property in the check passes from him and rests in the bank, although no express agreement was made transferring the check as so much money, and an endorsee of this check may recover of the drawer, notwithstanding stoppage of payment. * * *

"It is true no express agreement was made transferring the check for so much money, but it was delivered to the bank and accepted by it, and the bank gave Murray credit for the amount and he accepted it. That was enough. The property in the check passed from Murray and vested in the bank. He was entitled to draw the money so credited to him, for as to it the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee and, therefore, when by its directions the plaintiff received and gave credit for it upon account, it became its owner and entitled to the money which it represented. The check, therefore, for every purpose material upon this inquiry as between these parties, was money."

In Garrison v. Trust Co., (1905) 139 Mich. 392; 102 N. W. 978, a state bank sent to a savings bank a draft "for collection," but endorsing it generally. The savings bank stamped on the face of the draft "Collection No. 1627" and endorsed on the back generally, and sent it to a private bank, "for collection and credit." By the time the draft was collected, the savings bank suspended, being insolvent. The private bank credited the amount of the collection against the balance due it from the savings bank, and the Court held it was en-

titled to do so, also that neither the letter enclosing the draft "for collection and credit," nor even the stamp on the face, "Collection No. 1627," gave notice that the savings bank merely held the paper for collection and not as owner. The Court said:

> "The draft was sent to the Garrison Bank for 'collection and credit' in accordance with the uniform practice of twelve or fifteen years. The instruction to credit the proceeds of the draft to the City Savings Bank was inconsistent with the idea that that bank was a mere agent for collection, and was in harmony with the endorsement showing ownership."

In Dappelt v. National Bank (1898), 175 Ill. 432; 51 N. E. 753. D deposited checks with K. & Co. for collection, but endorsed in blank. They were forwarded to defendant, endorsed "for collection to the credit of K. & Co." They were collected and credited to K. & Co., which in the meantime assigned, being insolvent. Held, D could not recover the funds, and that his unrestricted endorsement authorized defendant to treat the checks as belonging to K. & Co., the depository. We quote from the case as follows:

> "A bank receiving from another bank for collection, a check endorsed in blank by the payee, is authorized to collect the check, credit the proceeds to the forwarding bank and honor its drafts against the credit; and the payee cannot, upon the insolvency of the forwarding bank, recover from the bank which made the collection, without proof that the latter had notice that the forwarding bank received the check merely as the payee's agent for collection. (Syllabus) * * *

> The appellant, Jacob Dappelt, deposited with the banking house of Kopperl & Co. two checks on New York banks, both endorsed by him in blank. * * * The banking firm deposited the checks with appellee, endorsing them 'For collection to the credit of Kopperl & Co.' Appellee gave credit on its books to Kopperl & Co. for the amount and sent the checks on to New York for collection."

In American Exch. Bank v. Theummler (1902), 195 Ill. 90; 62 N. E. 932. T, holding a draft payable to her order, on a St. Louis bank, deposited it in a Milwaukee bank, for collection, but endorsed in blank. The draft was sent to Chicago "for collection and credit," endorsed generally, and was forwarded "for collection" to St. Louis, where it was paid, and credited back to the Chicago bank. Depository bank at Milwaukee, being insolvent, suspended, and the Chicago bank credited the collection against the amount due it from the insolvent bank. Held, T, by endorsing in blank, lost the right to claim the funds in the Chicago bank. We quote as follows from the case:

"When appellee left her draft, which was payable to her order, with the South Side Savings Bank of Milwaukee, she endorsed the draft in blank. She did not sell the draft to the South Side Savings Bank of Milwaukee, but left it for collection only. The draft was sent by the South Side Savings Bank to the appellant to be collected (letter accompanying draft said "I herewith enclose for collection and credit") but the appellant, it is conceded, had no notice or knowledge that the draft had been left with the Milwaukee bank for collection only, and that the Milwaukee bank received the draft

from appellee as agent, and not as owner."

(The Court held that American Exchange Nat'l Bank became the owner of the draft as against the depositor in the South Side Savings Bank, which failed.)

American Ex. Nat. Bk. v. Theummler, 195 Ill. 95.

In Cody v. Bank (1881), 55 Mich. 380; 21 N. W. 373. C deposited with R. & M. a check endorsed in blank. R. & M. endorsed "for collection" and forwarded the check to Chicago, with a letter asking for $2,000.00 in currency. R. & M. were insolvent at the time of the deposit, and two days later suspended. C, on learning of the suspension, wired Chicago, stopping payment, and later C sued in trover for the value of the check. The Court said:

"CAMPBELL, J. Plaintiffs sued defendant in trover for the value of a bank check or draft made November 2nd, 1883, by the Thayer Lumber Co. to the order of plaintiffs, for $3,600.00, on the Merchants' Loan & Trust Co. of Chicago.

"The facts are undisputed, and are these: Plaintiffs are engaged in lumbering near Cadillac, and at the date of the check had for about a year kept a deposit account with Rice & Messmore, bankers there. Their deposits were chiefly made in checks and other paper which they took in their business, and these they usually endorsed in blank, and they were at once passed to their credit as cash, and subject to be drawn upon as cash. Some, but comparatively little, money was deposited, and both money and paper were credited as cash on the deposit account. The plaintiff Cody, one

of the firm of Cody & Moore, did not usually have charge of the banking matters of plaintiffs, and could only remember one previous deposit made by him, and this was in paper credited as cash.

"On the 3rd of November, 1883, plaintiff Cody, having this check in his possession for his firm, took it to the bank of Rice & Messmore, and endorsed it in blank, and handed it in without any remark or directions as to what should be done with it. On the same day he drew one or more checks, but not enough to exhaust the previous deposit. The bank officer to whom it was handed filled out a deposit ticket and placed it on the usual spindle for entry, and it was so entered when the tickets were withdrawn. Whether plaintiff noticed this is disputed.

"On the same day, November 3rd, this check, with several others, was endorsed to defendant for collection, and sent in a letter directing the defendant to collect and credit the paper, and in the same letter directing defendant to send $2,000.00 currency, which was sent accordingly on the morning of the fifth. Three thousand dollars more had been sent on the 3rd in answer to dispatches. The remittance, as testified, would not have been made except on the faith of the enclosures, and after applying this paper the balance in Rice & Messmore's favor was less than $200.00.

"It had been the regular course of business between Rice & Messmore and defendant, that defendant should remit on the faith of the paper thus transmitted to it by Rice & Messmore, and it was done in this instance.

"Defendant forwarded the paper to Chicago for collection, but it was not paid, for these reasons: On Monday, the 5th of November, there was a run on Rice & Messmore, and during the forenoon they closed their doors and suspended. They turned out to be insolvent. On the 6th, Cody was in Cadillac, and learning of the suspension telegraphed to Chicago to stop payment. The paper was accordingly returned unpaid to defendant. Plaintiffs claimed it as belonging to them and brought this suit, when defendant refused to recognize their right.

"In the Court below defendant prevailed, and plaintiffs bring error. There are several errors assigned, but all refer to the question whether defendant had a right to act upon the paper as it appeared. The Court below charged at some length, and allowed the jury to consider the facts shown in testimony, showing the true nature of the business dealings of all the parties. But the whole case really hinged upon whether the defendant had notice which should have prevented it from treating the paper as Rice & Messmore's and advancing them money upon it.

"We do not find any testimony in the record which would have justified the jury in finding otherwise than they did, and if the Court erred at all, it was in leaving this to them as an open question.

"When the paper came into defendant's hand it had an unqualified blank endorsement of plaintiffs which presumptively transferred title to any one who might become the holder. The fact that Rice & Messmore en-

dorsed it for collection had no tendency to show that they held it themselves merely as agents for plaintiffs, or even received it from them directly. The undisputed facts show that it was not left with them in such a way that they were bound to regard it themselves as left for plaintiff's use, except as a deposit. But the defendant is not claimed to have had any notice outside of the paper itself. The paper came to defendant with express directions to *collect and credit, and with an order for an immediate remittance of a large sum, which nearly exhausted it. This was not an exceptional case, but was in the usual course of their mutual business.*

"Plaintiffs rely on several cases which hold that a mere endorsement for collection does not itself change title, and that where the recipient bank has done no act on the credit of the remitting bank in reliance on its title, the real owner may reclaim it. But none of those cases resemble this. Here plaintiffs did not endorse it for collection, and upon the testimony it cannot be said they even deposited it for collection. Rice & Messmore, when they endorsed it for collection, not only appeared to be the owners, but gave orders for credit to them and drew upon the faith of it, and defendant actually advanced money upon it. No case is cited which would under such circumstances postpone defendant to plaintiffs. The whole doctrine of negotiable paper is in defendant's favor."

The case of Bank of Metropolis v. New England Bank, 1 How. 42, U. S. 234; 11 L. Ed. 115; 6 How. 47 U. S. 212; 12 L. Ed. 409, is so frequently referred to in the fore-

going citations, that more than mere reference to it here would be superfluous.

In Wyman v. Colorado National Bank, 5 Colo. 30. W drew on London and deposited with C, a banker, to collect. C forwarded the draft to defendant "for collection and credit," endorsed "for account C." Defendant forwarded through usual channels. The draft was paid and funds returned to defendant, but meanwhile C had failed and W notified defendant, before it obtained the funds, that C had taken the draft for collection. Defendant, however, had credited C with the amount of the draft on first receiving it. The Court said (page 32):

"The principal question to be determined is whether upon the facts in the case the defendant, when it received the draft from Corning, became a bona-fide holder for value, or upon a sufficient consideration and without notice of any infirmity of title as between antecedent parties so as to be protected from the equities of the plaintiff.

"The endorsement of C as payee was sufficient to transfer the legal title of the draft to the Colorado National Bank and vest in it the complete ownership. The possession of the paper by the defendant, as such endorsee imported *prima facie* that it was acquired in good faith for full value in the usual course of business before maturity, and without notice of any circumstances impeaching its validity; and that such holder was the owner thereof, entitled to recover the full amount against all prior parties. * * * Receiving the draft in the usual course of business from the payee,

who was largely indebted to the bank, and who endorsed the paper for account of himself specially, *and who transmitted it with directions for credit as well as for collection,* the officers of the bank so receiving may well have inferred that Corning was the owner of the draft, and intended the proceeds to be applied in extinguishment pro tanto of his indebtedness to defendant." (The draft was accompanied by a letter—"I enclose for collection and credit.")

Again on page 36: "In this, as in all other like cases, there is a hardship in the loss, let it fall upon either the plaintiff or the defendant, but it is an elementary rule that whenever one of two parties must suffer by the act of a third, he who has enabled that third person to occasion the loss must sustain it himself, rather than the other innocent party.

"The general doctrine that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. The transaction in legal effect is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquired title to the money, drafts or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."

Cragie v. Hadley, 99 N. Y. 133;
Bank of the Republic v. Millard, 10 Wall. 155.

The Portland Bank elected to accept said check and credited it, and the relation of debtor and creditor was established, and the Portland Bank became an innocent holder for value. The general law as to whether the relation of debtor and creditor was established, has been well expounded by the Supreme Court of the United States in the very recent case of Burton v. United States. This was an action instituted against Joseph Burton, the United States Senator from Kansas, for a violation of the statute prohibiting Senators and Representatives from receiving special fees. One of the questions which arose in the case, and in fact the gist of the crime charged, was whether or not Burton had received as a fee, a certain sum of money at Washington, D. C., or at St. Louis, Missouri. It appeared from the record that certain checks drawn upon the Commonwealth Trust Company at St. Louis, Missouri, were received by him in the City of Washington, D. C., and there endorsed and deposited with the Riggs National Bank of Washington, D. C., and the same were credited to his account with the latter bank. The cashier of said bank testified at the trial that the defendant had the right immediately after the credit was made, to draw out the whole or any portion thereof, without waiting for the payment of the check at St. Louis. On this state of facts, the Court determined that Burton had received the money at Washington and not at St. Louis, and rendered its opinion in the premises, as follows:

"There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, endorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank, and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the endorser of the check, and nothing more. There was nothing whatever in the evidence showing any agreement or understanding as to the effect of the transaction between the parties—the defendant and the bank—

making it other than such as the law would imply from the facts already stated. The forwarding of the check 'for collection,' as stated by Mr. Brice, was not a collection for defendant by the bank as his agent. It was sent forward to be paid, and the Riggs bank was its owner when sent. With reference to the jurisdiction of the Court over the offense described in the sixth and following counts in the indictment, the Court held that if the checks were actually received by the defendant in Washington, and the money paid to him by the bank in that city, and the title and ownership of the checks passed to the bank at that time, the Court in Missouri had no jurisdiction to try the offenses set forth in those counts of the indictment already referred to. There was no question that such was the fact, and it was error to submit the matter to the jury to find some other fact not supported by any evidence. * * *

"The general transactions between the bank and a customer in the way of deposits to a customer's credit, and drawing against the account by the customer, constitute the relation of creditor and debtor. As is said by Mr. Justice Davis, in delivering the opinion of the Court in National Bank of the Republic v. Millard, 10 Wall. 152, 19 L. Ed. 897, in speaking of this relationship (page 155, L. Ed., p. 899):

"'It is an important part of the business of banking to receive deposits; but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debt-

or, and he agrees to discharge these debts by honoring the checks which the depositor shall, from time to time, draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell in the House of Lords in the case of Foley v. Hill, 2 H. L. Cas. 28, and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authorities is to the same effect.'

"When a check is taken to a bank, and the bank receives it and places the amount to the credit of a customer, the relation of creditor and debtor between them subsists, and it is not that of principal and agent.

"The case of Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537, contains a statement of the rule as follows, per Andrews, Chief Judge:

" 'The general doctrine that upon a deposit made by a customer, in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks, is immediately vested in, and becomes the property of the bank, is not open to question. The transaction, in legal effect, is a transfer of the money, or drafts, or checks, as the case may be, by the customer to the bank, upon an implied contract on the part

of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquired title to the money, drafts, or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business.'

"In Metropolitan National Bank v. Loyd, 90 N. Y. 530, one of the cases referred to by Judge Andrews, Judge Danforth, in speaking of the effect of placing a check to the credit of a depositor in his account with the bank, said that:

" 'The title passed to the bank, and they (the checks) were not again subject to his control, Scott v. Ocean Bank, 23 N. Y. 289 (and other cases cited in the opinion).

" 'It is true no express agreement was made, transferring the check for so much money, but it was delivered to the bank and *accepted by it,* and the bank gave Murray credit for the amount, and he accepted it. That was enough. The property in the check passed from Murray, and vested in the bank. He was entitled to draw the money so credited to him, for, as to it, the relation of debtor and creditor was formed, and the right of Murray to command payment at once was of the very nature and essence of the transaction. On the other hand, the bank, as owner of the check, could confer a perfect title upon its transferee, and, therefore, when, by its directions, the plaintiff received and gave credit for it upon account, it became its owner, and entitled to the money which it represented. If, as the appellant insists, the check had been deposited

for a specific purpose—for collection—the property would have remained in the depositor; but there is no evidence upon which such fact could be established; nor is it consistent with the dealings between the parties, or with any of the admitted circumstances.

"These show that it was the intention of both parties to make the transfer of the check absolute, and not merely to enable the bank to receive the money upon it as Murray's agent.'

"The same principle is set forth in Taft v. Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387. In that case the Court said:

" 'So, when, without more, a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker.

"In the case at bar the proof was not disputed. The checks were passed to the credit of defendant unconditionally, and without any special understanding. The custom of the bank to forward such checks for collection is a plain custom to forward for collection, for itself. The only liability of defendant was on his indorsement. All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth and ninth counts of the indictment. The Court should have, therefore,

directed a verdict of not guilty on those counts." Burton v. United States, 196 U. S. 282 (1904)."

In Hoffman v. National Bank, 46 N. J. Law, 605, it is said:

"Parker, J. These causes were argued together.

In each case the declaration is against the maker and endorser of a bank check.

In one case Luther Hoffman was the maker of a check drawn on the Clinton National Bank, payable to the order of Schmidt and Scarry, who endorsed the same. In the other case the check was drawn upon the Second National Bank of Jersey City, by Aaron S. Bennett, to the order of Michael Farley, and by him endorsed.

On the 9th day of January, 1883, these checks were deposited by the respective payees in the City Bank of Jersey City, where they kept accounts, by general endorsement and on the same day, the checks were passed by said City Bank to the First National Bank of Jersey City.

On the next day, January 10th, the City Bank closed business, and it then appeared that the said bank was insolvent.

It appears from the evidence that at the close of business on the 8th day of January, 1883, the City Bank was indebted to the First National Bank in the sum of $58,300.00, and at the close of business on the 9th day of January in the sum of $54,485.13 for loans

and overdrafts. The checks were received by the First National Bank from the City Bank as cash, and applied to the then subsisting indebtedness of the City Bank.

There is no evidence to prove that the Cashier of the First National Bank, or any of its officers or Directors, knew, at the time the checks were passed to their bank, of the insolvency of the City Bank.

There is no proof of fraud or collusion on their part. On the contrary, the testimony is conclusive that the transaction on the part of the First National Bank was bona fide, and that the checks were received from the City Bank on a subsisting indebtedness and credited under the belief that the paper belonged to the City Bank.

At the trial the jury was instructed to render a verdict in each case for the plaintiff for the full amount of the respective checks, and interest.

This instruction was right. There was nothing about the checks themselves to show, nor did it appear by the testimony that they were deposited in the City Bank for collection. If it had been intended by the payees to leave the checks with the City Bank merely for collection, the words 'for collection' should have been added to the endorsements. But the endorsements being general and the checks passed to the credit of the depositors on the books of the City Bank, from that moment they became the property of the City Bank, and such bank became liable to the depositors

to pay any checks they might draw upon it to the amount of their deposits.

Had the payees endorsed the words 'for collection' on the checks, they would have saved all question. Cecil Bank v. Tanners, 22 Md. 148.

But they chose to neglect this precaution, and endorsed generally, and thereby permitted another to appear as owner; and if thereby any person was misled, and loss occurred, it is proper that they whose carelessness gave opportunity for the other to be deceived should bear the loss. Morse on Banking, 422.

The holder of a check payable to order, and endorsed in blank by the payee, with a general endorsement, is presumed to be the owner, and such check, like other commercial paper, will pass by delivery.

In Terhune v. Bank of Bergen County, 7 Stew. Eq. 367, it was held that a complainant who deposited in said bank checks of various persons, on different banks, by general endorsement, absolute on the face, the day before the bank closed its doors (the checks having been forwarded in the meantime), was not entitled to preference over other creditors of the bank.

In Titus & Scudder v. Mechanics' National Bank, 6 Vroom, 588, Chancellor Zabriskie, in delivering the opinion of this Court, said that checks received by a bank and credited as cash were to be treated in the same way as if the credit was of notes of other banks, and that by such credit the bank becomes the owner of

the checks as fully as if they were legal tender notes or bank bills deposited.

The checks on which these actions were commenced having been endorsed generally, and delivered to the City Bank by the endorsees, became the property of the City Bank as soon as passed to their credit, and could legally be transferred to the First National Bank of Jersey City, or to any other bona fide creditor.

If the City Bank had held the checks until after its insolvency, and they had come to the hands of a receiver, a court of equity might have compelled return to the depositors. Nixon, J. in Balbach v. Frelinghuysen, Receiver, 6 N. J. Law Journal, April, 1883.

But in this case the checks were transferred to the First National Bank before insolvency ascertained, in payment of a debt, and although the transfer was only the day before the City Bank closed its doors, the right to the checks and to the proceeds thereof passed to the First National Bank.

In the absence of fraud, the length of time between the transfer and the insolvency is not material."

Under the state of facts presented by the case at bar, certainly no dispute can arise as to the bona fide character of the position occupied by the Portland Bank, and under such conditions, the law seems to have afforded ample protection for its rights. There is no question but that the Portland Bank had no knowledge whatsoever of the insolvent condition of the La-

Grande Bank, which brings it directly within the rule and state of facts set forth in the New Jersey case above cited.

"When a negotiable instrument, indorsed and delivered to a bank, though in fact only for collection, is sent by it to another bank for 'collection and credit' before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain, on the faith of receiving payment from such collections, pursuant to a usage between the two banks." Vietrey v. State Savings Assn., 21 Fed. 773.

"Where a promissory note, payable to order, is endorsed by the payee without qualification, such endorsement imports property in the holder; and without notice to the contrary, a person who receives it from such holder, has a right to treat him as the *bona fide* owner of the note, and is not bound to make inquiry whether he holds it as agent or otherwise. * * * In an action by D. M. & Co. against the bank to recover the amount collected on said notes, held: * * * That the right of the defendant to retain the proceeds of the notes in its hands to be applied in part extinguishment of the general balance remaining due on account by J. L. & Co. depended on the question, was credit really given J. L. & Co. on the faith of these notes before the receipt of knowledge that they belonged to the plaintiffs? That if

such credit were in fact given, it made no difference whether it was in the form of *advances of money or balances on account of mutual dealings* between the parties, suffered to remain undrawn for."

Miller v. Farmers & Mer. Bank, 30 Md. 392.

"If paper be deposited in or forwarded to a bank for collection, and in pursuance of a prearranged mode of dealing, the bank immediately places the amount to the credit of the depositor, and the depositor thereupon draws or is entitled to draw against the same as cash, this works a transfer of title so that the depositor can not afterward claim the paper; and it is immaterial that if the paper is not paid, the bank has the right to charge it back." (Check was accompanied by a letter, stating "for collection and credit.")

Ayrs. v. Farmers & Mchts. Bank, 79 Mo. 421.

In Winfield National Bank v. McWilliams, 9 Okla. 493, McWilliams deposited a check for collection with the Farmers & Merchants' Bank, McWilliams endorsing the check in blank. The Farmers & Merchants' Bank then endorsed the check in blank, and forwarded it with other checks and drafts to the Winfield National Bank, at Winfield, Kan., "for collection and credit," which items were credited to the account of the Farmers & Merchants' Bank, subject to check. The syllabus reads:

"Where a bank, in the due course of business, receives from a correspondent bank a check endorsed

in blank, and in good faith parts with value, or permits an existing indebtedness to remain unpaid by reason thereof, it is entitled to the proceeds of such check against the real owner, even though the check was not actually collected by such bank until after failure of the bank which transmitted the same to it. The holder of a check endorsed in blank, in law, is presumed to be the legal owner for value."

"A note was made to plaintiff's order, endorsed by him and sent through the house of Brady, a banker, for collection, by him endorsed to the defendant, a bank, 'for collection and credit.' Held, that Brady, by the endorsement (to him) did not become the owner of the note, and had no right to pledge it, or direct its proceeds to be credited to him in payment of his indebtedness to the defendant. *If the defendant had made advances or given new credit to Brady on the faith of the note, it would have been entitled to retain the amount out of the proceeds.*"

First Nat. Bank of Clarion v. Gregg, 79 Pa. 384.
Carroll v. Exchange Bank, 30 W. Va. 518.
Friberg v. Cox, 37 S. W. 283 (Tenn. 1896).
Wood v. Boylston Nat. Bank, 129 Mass. 358.
Rathtone v. Sanders, 9 Ind. 217.
City of Somerville v. Beal, Receiver, 49 Fed. 790.

"A deposit is general unless expressly made special or specific."

1 Morse on Banks and Banking, Sec. 186 (3d Ed.).

"If checks, notes, etc., are deposited for collection, credited to the depositor on general account, and *drawn against,* the bank is holder of the paper for value."

2 Morse on Banks and Banking, Secs. 573 and 575 (3d Ed.).

"Where a negotiable instrument, indorsed and delivered to a bank, though in fact only for collection, is sent by it to another bank for 'collection and credit' before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payment from such collections, pursuant to a usage between the two banks."

2 Morse on Banks and Banking, Sec. 592 (3d Ed.).

The Portland Bank having received the check without notice of the insolvency of the La Grande Bank, the defense of insolvency of the La Grande Bank can not be interposed.

Continental National Bank of Memphis v. First National Bank, 84 Miss. 103.
Bank of Metropolis v. New England Bank, 6 How. 227.
Sweeney v. Easter, 68 U. S. 166, 1 Wall.

"If a bank receives deposits of money, drafts, or checks after knowledge of the insolvency is acquired by the officers or agents in charge, it is, in a legal

sense, guilty of fraud. While the effect of a deposit in a solvent bank is to vest the title of the thing deposited, in the bank, upon an implied contract that it shall repay the amount upon the checks of the depositor, yet, if the bank be chargeable with fraud in receiving it, the depositor may on discovering that fact, rescind the contract and reclaim the property, unless it has in the meantime passed into the possession of a bona fide holder." New York Brew. Co. v. Higgins, 79 Hun 251 (1894). Parker, J.

"Upon principle there can be no reason why, if parties choose to treat a deposit of paper, or other securities, as cash, so that it is available to the depositor as cash, the transaction should not be regarded as equivalent to a deposit of money."

Wasson v. Laint, 120 Ind. 578.

"Transfer of a note to a bank for collection gives it such ownership thereof that it can sue the maker thereon."

First Nat. Bank of Ft. Collins v. Hughs, 46 P. 272 (Cal. 1896).

The charging back of unpaid checks is a general custom among bankers, and it is also a legal right. In 2 Morse on Banks and Banking, page 960, it is said:

"As against the bank, the title passes by such crediting (as cash), subject, however, to the condition that if the paper is not paid it shall be returned to the depositor, this condition being embedded in the transaction by the fact that banks continually claim and

exercise this right, and by the justice of the case since there is no consideration moving to the bank for its accepting any risk on the paper, and the security and dispatch of business do not require any other rule."

In Sec. 578, same volume, it is said:

"When a note or check is received for collection and credited, the transaction does not preclude the bank from cancelling the credit, if the note or check is dishonored or proves to be worthless."

This is a case where there is no dispute of facts. The Sugar Company's check was endorsed by it to the LaGrande Bank unconditionally, and was endorsed by the LaGrande Bank to the Portland Bank unconditionally. The Portland Bank had no notice of any of the defenses raised, but received the check as cash and credited the LaGrande Bank with the amount, and paid out the full amount thereof on drafts of the LaGrande Bank, thus making a full consideration for the credit. At the time of the receipt of the check by the Portland Bank there was a balance in favor of the LaGrande Bank, very much less than the amount of said check, viz.: something under $2000.00, and afterward there were received other remittances from the LaGrande Bank, and numerous drafts were paid by the Portland Bank, so that at the time the Portland Bank received notice of the closing of the doors of the Farmers & Traders' Bank, it had on hand only the sum of Nine Dollars and Eighty-five Cents. The evidence shows that during the time the Portland Bank was a correspondent of the LaGrande Bank, the Portland Bank

credited as cash all checks sent to it, as this one was, and allowed the LaGrande Bank to draw against the deposits as cash, and the LaGrande Bank treated the matter in the same way, as it continuously during said time immediately drew against the credits made by its deposits of checks, and in particular, in this instance did so long before it was possible for the Portland Bank to have realized upon the check. The letter accompanying the check, saying it was remitted for collection and credit, was no notice that the Sugar Company had deposited the check for collection only with the LaGrande Bank, if such were the fact. In our opinion, under the wording of the deposit tag of the LaGrande Bank, this check was not deposited for collection only, but the wording of said deposit tag shows to us clearly that it was the intention of the Sugar Company and the LaGrande Bank that said check should be received by said LaGrande Bank the same as a cash deposit, for the reason that the tag states in effect that in the event checks deposited were not realized upon, the bank would have the right to "charge back."

The Portland Bank, therefore, became the owner and holder of this check in due course, and the payment of the same having been stopped by the Sugar Company the Portland Bank is entitled to recover the same from the maker. The case of Matlock v. Scheuerman, 51 Or. p. 49, is a case in point. The Portland Bank, as the owner and holder of this check, is entitled to recover upon the same, in the same manner and with the same effect as it would upon a promissory

note executed by the Sugar Company to the LaGrande Bank, and by the LaGrande Bank endorsed over to the Portland Bank.

II.

Concerning Sugar Company's Authorities.

We are unable to concede that any of the cases cited by Sugar Company are in point. Many of them pointedly recognize the doctrine adopted by the trial court in this case. It should be remembered that the gist of the Portland Bank's right of recovery is that it is a bona fide holder in due course.

The first case cited by the Sugar Company in re State Bank, 57 N. W. 336; 56 Minn. 119, was an action by a depositor against the receiver of the depository bank. The case would be in point if the present action were between the Sugar Company and the LaGrande Bank.

In the opinion is this language, apparently inadvertently omitted from the quotation given by Sugar Company's counsel; beginning where the quotation in their brief ends, the Court said:

"Of course, in all such cases the banker, like a factor, has a lien for advances made on the faith of the paper, and consequently the claim of the customer may be modified by the state of his account."

Thus, had the LaGrande Bank made advances to the Sugar Company on the faith of this paper, the LaGrande Bank would have had a lien on the paper.

In the same paragraph the Minnesota court indicates the distinction to be noted between most of the cases cited by the Sugar Company and the case at bar. The Court said:

"There should be kept in mind the distinction between (1) those (cases) where the paper was still in the hands of the bank or its assignee * * and (2) *those where the bank, clothed by the owner with the indicia of ownership had transferred the paper or its proceeds to a bona fide purchaser.*"

The case at bar falls within the second of these groups. We have already shown that the Portland Bank is a bona fide holder. In the case at bar the paper was not in the hands of the depository bank, nor of its assignee in bankruptcy; therefore the cases which concern such a condition are not in point. The following of Sugar Company's authorities fall within the first group:

In re Bank of Minnesota, 77 N. W. 796; 75 Minn. 186.

This was an action by a depositor to recover from an insolvent bank, paper in the possession of its receiver.

Armour Packing Co. v. Davis, 24 S. E. 365; 118 N. C. 548.

An action by a depositor to recover from an insolvent bank, paper in the possession of its receiver. This case quotes with approval the quotation from the case of In re State Bank, given above, as follows:

"Of course, in all such cases the banker, like a factor, has a lien for advances made on the faith of the paper, and, consequently, the claim of the customer may be modified by the state of his account."

St. Louis Railway v. Johnson, in 133 U. S. 566; 33 L Ed. 683.

A proceeding by a depositor to recover from the receiver of an insolvent bank, proceeds of a draft which had been collected after insolvency.

Wasson v. Hawkins, 59 Fed. 233.

Suit by a depositor to recover from the receiver of an insolvent bank, a deposit made a few minutes before the bank suspended.

Somerville v. Beal, 49 Fed. 790.

Suit by a depositor to recover from the receiver of an insolvent bank a deposit made a few imnutes before the bank suspended.

Richardson v. Olivier, 105 Fed. 277.

Suit to recover deposit in the hands of the insolvent bank.

Richardson v. Continental Bank, 94 Fed. 450.

Suit to recover deposit in the hands of the insolvent bank.

Re Stewart, 176 Fed. 463.

This citation is erroneous. It should be 178 Fed. 463. Suit to recover deposit in the hands of an insolvent bank.

In Bank of America v. Waydell, 187 N. Y. 115; 79 N. E. 857.

The paper for collection was 60-day paper, and the bank had actual notice before maturity of the claim of the depositor's ownership and that he demanded its return. This case recognizes the rights of a bona fide holder and the decision emphasizes the elements of want of value and actual notice which prevented the plaintiff from becoming a holder in due course. The Court said:

"(Plaintiff) obtained no better title to it or the proceeds thereof than the remitting bankers had *unless it became a purchaser for value without notice of any defect of title.*"

The Portland Bank in the case at bar, having become a puchaser for value without notice, this case is authority in favor of the Portland Bank.

Again, "As already stated, it (plaintiff) paid nothing to Ives & Son, gave them no credit, made no entry or writing in their account *or did any other act importing a consideration, and it had notice a month before the paper fell due and was distinctly advised that the Detroit bankers did not own it, but that the drawer did.* * * *

"There are no elements in the case that can give to the plaintiff the character of a bona fide holder for value without notice. It had notice of the real situation *before the paper fell due, and as it did not part with, or pay, any valuable consideration, at* the time

it received the paper or at any other time, it is in no worse situation legally than it was before it received it."

Turning to the case at bar, we compare the situation of the Portland Bank before and after the receipt of the Sugar Company's paper. *The Portland Bank is $4,000.00 worse off than it would be had the Sugar Company not issued this paper*—$4,000.00 worse off than it was before it received this paper. The Portland bank paid cash and without notice.

It will be observed what importance is attached by the Court in the foregoing case to these elements, that is, the payment of value and the absence of notice, and the opinion clearly indicates what protection would be afforded were these elements present; so under the doctrine of the above case, the Portland Bank could and did obtain a better title than the remitting bank had.

In Armsrong v. National Bank, 14 S. W. 411; 90 Ky. 431, no money had been advanced on the faith of the paper. If there had been, the Court indicates what rule it would have followed thus:

"*And if checks, notes, etc., are deposited for collection, credited to the depositor on general account, and drawn against, the bank is holder of the paper for value;* and if it becomes insolvent it forms part of its assets."

Applied to the case at bar, the result of this rule is: Had the Sugar Company drawn against the check in

suit upon the LaGrande Bank, that bank would have become a holder of the paper for value, so when the LaGrande Bank sent the paper with indicia of ownership to the Portland Bank and drew against it, the Portland Bank became the holder of the paper for value.

> First National Bank of Circleville v. Bank, 33 Fed. 408.

The paper in suit was endorsed "For collection for First National Bank of Circleville." This case, too, recognizes the doctrine for which we contend. It is said:

"If the defendant had been justified in assuming that the draft was the property of the Fidelity Bank, it would have been entitled to a lien upon it for a balance of account, no matter who was the real owner of the paper."

Why was defendant not justified in assuming that title was in the Fidelity Bank? The Court continued:

"*But the draft bore the endorsement of the plaintiff in a restricted form,* signifying that the plaintiff had never parted with its title to the paper. * * * *In view of the restrictive endorsement* of the plaintiff upon the draft, if the defendant had actually made an advance to the Fidelity Bank on the faith of the draft, it could not have retained the proceeds as against the true owner."

In the case at bar there was no restrictive endorsement. There is no such element in this case. Para-

phrasing the above Court, the language is pointed in expressing the rights of the parties hereto.

"If the Portland Bank had been justified in assuming that the check was the property of the LaGrande Bank, it would have been entitled to a lien upon it for a balance of account, no matter who was the real owner of the paper."

The Portland Bank was so justified because the paper bore no restricted endorsement. It bore nothing but evidence of ownership by the LaGrande Bank.

Several other of appellant's cases concern paper which was specifically endorsed "For collection." This condition does not exist in the case at bar, and therefore these cases are not in point.

We have shown heretofore in this brief that the letter accompanying the paper in suit was not sufficient to put the Portland Bank on notice that the LaGrande Bank was not the owner.

> Commercial National Bank v. Armstrong, 148 U. S. 52; 37 La. Ed. 363.

The endorsement was "For collection." Justice Brewer said:

"The Fidelity received the paper as agent, and the endorsement 'For collection' was notice that its possession was that of agent and not of owner."

> Sweeney v. Easter, 1 Wall. 166; 17 L. Ed. 681.

The paper bore the restrictive endorsement "For collection."

Evansville Bank v. German-American Bank, 155 U. S. 556; 39 L. Ed. 259.

The paper bore the restrictive endorsement "For collection."

Levy v. National Bank, 15 Fed. Cases, 8289.

This bill of exchange was specially endorsed to the defendant bank, "For collection on account of the plaintiff."

National Bank v. Hubbell, 117 N. Y. 384; 22 N. E. 1031.

The paper bore the restrictive endorsement "For collection."

Freeman's National Bank v. National Tube Works, 24 N. E. 779; 151 Mass. 413.

The paper bore the restrictive endorsement "For collection."

Bank of Clarke County v. Gilman, 81 Hun 486.

The paper bore the restrictive endorsement "For collection and credit."

Cases in which there was no transfer of the paper for value are not in point because the element of value necessary to constitute a bona fide holder is wanting. Such cases do not come within the second group indicated in the case of In re State Bank supra.

For this reason the following of appellant's cases are not in point:

Josiah Morris Co. v. Alabama Carbon Co., 36 So. 764; 139 Ala. 620.

In this case no person had advanced any money or other valuable thing on the paper.

Commercial Bank v. State Bank, 132 Ia. 706; 109 N. W. 198.

No money or other valuable thing was advanced on the faith of this paper.

Scott v. Ocean Bank, 23 N. Y. 289.

No advances were made on the faith of the paper and it was found that defendants accordingly were not bona fide holder.

Craigie v. Hadley, 99 N. Y. 131.

No advances were made on the faith of the paper.

Barker v. Prentiss, 6 Mass. 430.

No advances were made on the faith of the paper.

Lawrence v. Stonington, 6 Conn. 521.

No value was paid for the paper. Moreover, this case is contra to the great weight of authority in that it holds that a bank which has made a collection may not retain the proceeds as a set-off against the balance due from the forwarding bank.

The case of Holmes v. First National Bank, 56 N. W. 1011; 38 Neb. 326, is not in point because it involved a blank endorsement on a note which was accompanied by a special parol agreement. The action was between the parties to the special agreement. The Court said:

"As to all the world, except the parties to the special contract, and as between themselves only, the character

of the instrument as commercial paper will remain unaffected. * * * A blank endorsement of a negotiable instrument before due, where the transfer is to a bona fide holder in the due course of business, establishes a liability which can not be varied by parol evidence. But as between the original parties a blank endorsement may be modified by parol. * * * And oral testimony is admissible to prove the actual agreement. This does not affect the paper as to third persons who have no notice of this agreement, where the paper is transferred before due for a valuable consideration."

Corbett v. Fetzer, 66 N. W. 417; 47 Neb. 269.

An action by the assignee of a note against endorsers of it. The Court quoted and adopted the rule of Holmes v. Bank supra.

"As against a subsequent bona fide holder, the liability created by the endorsement in blank of a bill or note, can not be varied by parol evidence, but that as between the original parties thereto, the precise terms of such contract is always a subject of inquiry.

Sloan v. Gibbes, 35 S. E. 408; 56 S. C. 480.

This was an action between co-sureties to enforce contribution. The question was whether parol evidence could be received to show that successive endorsers were in fact co-sureties. The case touches no fact or principle involved in the case at bar.

Whitney v. Spearman, 70 N. W. 240; 50 Neb. 617.

A replevin action. The question involved sufficiently appears from the following quotations to show that the case is not in point:

"The testimony was not, it should be remembered, received for the purpose of varying the times (terms?) of the unrestricted endorsement as against one claiming to be a bona fide holder of the note. Between the parties to such an endorsement, the precise terms of the contract is always a subject of inquiry, and may be shown by parol evidence."

1 Daniel Neg. Inst. (3d Ed.) Sec. 333 is not in point.

It discussed the rights between a customer and the bank and the right of the customer to compel the bank to pay the amount before collection.

The true principles involved in the case at bar are found in Sections 337 to 340 of this work, heretofore referred to in this brief.

III.

The Sugar Company contends that because the Portland Bank had some funds on hand at the close of business on Saturday, the 10th day of October, 1908, when the LaGrande Bank closed its doors, to-wit: $1,839.01, that this amount should be deducted from the claim, or, if such contention should not hold, that it is entitled to the amount on hand with the Portland Bank at the close of business October 12th, 1908, the time when notice was given to the Portland Bank of the closing

of the doors of the LaGrande Bank, to-wit: $9.85, to which amount is to be added some other items, making a total of $376.37, these items being a return of remittances made by the Portland Bank directly to the LaGrande Bank and not received by it prior to the closing of its doors, the Receiver having returned the same to the Portland Bank, which amount was afterward paid by the Portland Bank to the Receiver of the LaGrande Bank.

The testimony of Mr. Schmeer, Cashier of the Portland Bank, shows that the full amount of this $4,000.00 check was paid out upon drafts of the LaGrande Bank. This testimony is not contradicted. In addition thereto, we invoke the rule which obtains in the case of open accounts, where debits and credits are continuously blended, in which case credits are applied so as to extinguish first those items which are earliest in point of time. In 2 A. & E. Enc. of Law, 2 Ed. p. 462, it is said:

"A similar rule obtains in the case of open accounts, where debits and credits are continuously blended. In such cases, credits are applied so as to extinguish first those items which are earliest in point of time. This rule has found almost universal application, both in England and the United States, it being held generally that in the absence of allegation of a particular application by one or both of the parties, no question as to a direction by the Court arises, the presumption being that the first item on the debit side is discharged by the first item on the credit side."

Many cases are cited.

The evidence shows that in either of these cases applying the above principle, the $4,000.00 was paid out prior to the close of business on October 10th, 1908, and that no part of said $4,000.00 was included in the balance on hand at the close of business on that day, to-wit: $1,839.01.

The following shows the conditions:

Date.	Paid.	Credit Bal.	Deposit.
Oct. 7th.	.....	$3,678.18	.....
Oct. 8th.	$4,862.62	3,041.59	$4,226.03
Oct. 9th.	1,413.54	3,526.60	1,898.55
Oct. 10th.	1,806.74	1,839.01	119.15
	Paid on Deposit of Oct. 8th.		
Oct. 8th.	$1,184.44	.....	.....
Oct. 9th.	1,413.54	.....	.....
Oct. 10th.	1,806.74	.....	.....
	$4,404.72		

This shows that at the close of business on the 10th day of October, 1908, the Portland Bank had paid the full sum of said $4,000.00, and had paid $178.69 upon subsequent deposits.

This being so, the Sugar Company's contention can not be sustained, and the Portland Bank is entitled to recover the full amount prayed for in its complaint.

Respectfully submitted,

CHAMBERLAIN, THOMAS & KRAEMER,
Attorneys for Defendant in Error.

With them on the Brief,
LESTER W. HUMPHREYS.

No. 1905

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

THE AMALGAMATED SUGAR COMPANY,
(A Corporation)
PLAINTIFF IN ERROR

vs.

THE UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, (A Corporation)
DEFENDANT IN ERROR

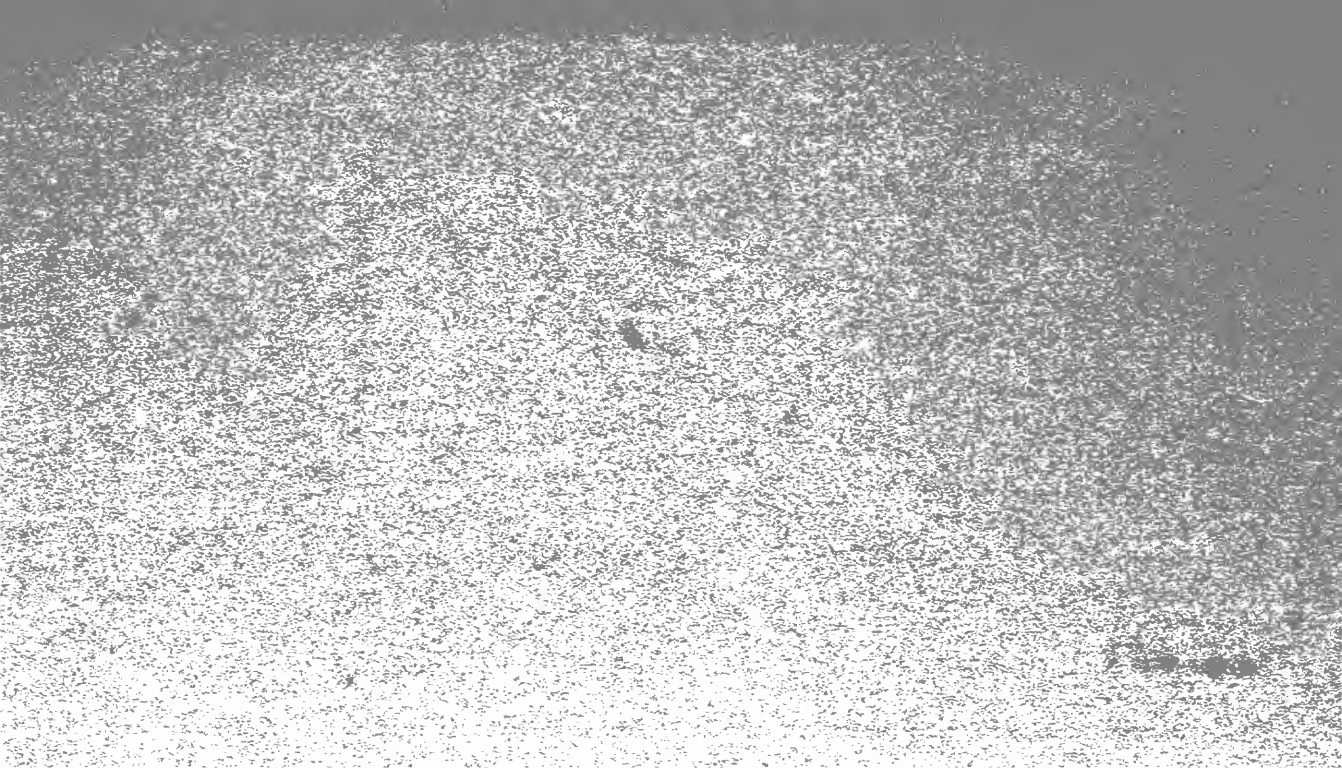
Petition for Rehearing

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON

SNOW & McCAMANT
GEO. B. GUTHRIE
For Plaintiff in Error

CHAMBERLAIN, THOMAS & KRAEMER
For Defendant in Error

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND, OREGON



IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

AMALGAMATED SUGAR COMPANY, a corporation,
Plaintiff in Error,

v.

THE UNITED STATES NATIONAL BANK OF PORTLAND, a corporation,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

PETITION FOR REHEARING

Comes now the Amalgamated Sugar Company, the plaintiff in error, by its attorneys, and respectfully petitions this Honorable Court that a rehearing be granted of its writ of error, for the reason that in the written opinion of May 23, 1911, this court has misconceived the vital arguments of plaintiff in error and has not fully discussed, nor fully determined, the following principal contentions of this plaintiff in error:

First

That the letter accompanying the check sent by the La Grande Bank to the Portland Bank, stating that the check was sent "for collection and credit," *per se* constituted *actual notice* that the check was in process of collection in behalf of the plaintiff in error.

Second

That the credit given the La Grande Bank by the Portland Bank upon the receipt of the check, and against which credit, drafts were honored before collection, was not legally a giving of *value* when, as admitted by defendant in error, the right to charge back to the La Grande Bank, the amount of the check, in the event of non-collection, was reserved.

We freely admit that had the Portland Bank paid actual value and had had no notice of plaintiff in error's rights, then, because of the general endorsement and the commercial usage well recognized by the law of negotiable instruments, the plaintiff in error would have had no rights sufficient to constitute a defense upon an action brought by the Portland Bank. It is incumbent upon the Portland Bank to show not only that it paid value for the check in question, but that it had no notice of the plaintiff in error's rights therein. With respect to the matter of notice, as we contend for, the opinion of this court seems entirely insufficient. In the first sentence, wherein the court states the facts of the case, it seems

to be assumed by the court that the Portland Bank took this check without knowledge of any defect impairing its commercial value. The opposite of this assumption, we submit, is and was our first principal contention.

In the middle of its opinion, the court devotes considerable space covering the question as to whether or not notice may be inferred because of the peculiar circumstances under which the check was circulated for the purpose of collection, and the court correctly states the rule to be that mere circumstance, or suspicious circumstance, or other matters which are suggestive of possible rights on the part of third parties, are not sufficient to constitute such actual notice as will defeat the right to recover upon a negotiable instrument. For the purpose of this petition, we admit all that is said on this question, and again insist that that argument does not answer our case. It is true that in our brief and argument we have adverted to these matters and have suggested that because of the large amount of the check, and because of its being a foreign check, and the collecting custom of banks, we might clearly infer that the Portland Bank must have known such a check to be in process of collection for some one, but we do not contend, nor have we ever contended, that those circumstances alone were sufficient to charge the Portland Bank with knowledge of our rights, but our principal contention, and one which the court has completely overlooked in its opinion, is that the letter, accompanying the check sent to the Portland Bank by and from the La Grande Bank, which letter stated that the check was enclosed "for collection and credit," constituted in and of itself actual, complete notice to the Portland Bank that

the check was in process of collection for us. To restate our argument in brief on this point, it is this:

It is admitted by all, and is so stated in the court's opinion, that had the check been endorsed "for collection and credit," no purchaser of the check would have secured a right paramount to the rights of this plaintiff in error. This is of course true, but it is also true that actual notice may be given by other means than by endorsement on the back of the check, and we insist that, if that check had been delivered to the proper officials of the Portland Bank, and if by mere *oral* instructions the Portland Bank had been informed that this check was given them for collection, upon that state of facts the Portland Bank would not have acquired such title to the check as to later say that it was a purchaser without notice. There is no rule of law which will protect one issuing an otherwise negotiable instrument, in the event that notice is given by reason of a written endorsement on the back of the instrument itself, but which will not so operate if the same instruction, or the same notice, is written on a separate sheet of paper and delivered coincident with the delivery of the check. All that is necessary is that there be actual notice, and this may be given by endorsement on the check, which necessarily informs every one to whom the check may be delivered; and it may be by separate writing, which also necessarily informs every person to whom that writing, together with the check, may be delivered, which is our case, but which will not inform those to whom the check is delivered and to whom the writing is not delivered, which is not our case. A special endorsement on the back of a check destroys negotiability only because notice is

actually and necessarily given by the endorsement. The reason thereof is one of the soundest and has its origin in those equitable rules of good morals and good conscience, which will not allow a person, charged with the explicit duty, or with the explicit notice, of taking an instrument for the purpose of collection, to disregard such notice or instruction and thereby seek to secure for himself the benefits of a purchaser without notice.

It is the further contention of this plaintiff in error that because the Portland Bank did not give an absolute credit to La Grande Bank upon the receipt of the check, no legal *value* was paid therefor. The transcript of record, at page 25, clearly shows by the testimony of the cashier of the Portland Bank that the arrangement and the custom with respect to such remittances was, in the event of non-collection, that a right to charge back the amount of such checks was reserved on the part of the Portland Bank. The books carry a considerable number of cases wherein this arrangement is discussed, and it has come to be known in the law as the giving of "provisional credit." It is our contention, and one in which, if we misread not the cases, we are supported by the great majority of authorities, that the giving of a provisional credit is not a giving of legal value as known to the law of negotiable instruments. We insist that it is impossible, philosophically speaking, to give value while retaining the right to withdraw that value at any time. It is frankly admitted by the cashier that no absolute right was given to this credit, but that it had been customary to allow checking to be made. In

the opinion of the court filed herein, this matter is given no consideration whatsoever, and, since it is a salient point in controversy, we respectfully petition the court that a re-investigation be made on the part of the court in respect to the plaintiff in error's authorities. We particularly wish to call attention to four cases cited in our brief, but which are not distinguished or explained, or even discussed in the opinion of the court. Upon these four cases we made our principal contention and we wish to call again the court's attention to them.

Josiah Morris & Co. v. Alabama Carbon Co., 36 So. 764 (Ala.).

In this case a sight draft came to Josiah Morris & Company, Bankers, bearing a general endorsement, but accompanied by a letter stating that it was enclosed "for collection and credit," and forwarded by one of its corresponding banks. The forwarding bank later became insolvent and the avails of this draft were sought to be applied by Josiah Morris & Company in liquidation of their book account debit against the forwarding bank. This case can be distinguished from the case at bar in only one particular, and that is, that the credits given the forwarding bank and absorbed by the sight draft in question, were credits which had been given in advance of the provisional credit extended upon the receipt of the check. It may be insisted by the court that the giving of antecedent value is not a giving of value within the meaning of the law of negotiable instruments. This is not, however, discussed by the court in the opinion nor made the ground of its decision, but it

is respectfully submitted that such is the only distinction which can be made between the two cases.

Bank of America v. Waydell, 92 N. Y. Sup. 666.

The facts of this case are almost identical to those of Josiah Morris & Company against the Alabama Company just referred to. It has, however, this distinction. In this case a special contractual agreement existed between the forwarding bank and the Bank of America, by the terms of which the Bank of America had the *express right to retain the proceeds* of all drafts, checks and other matters of collection, such proceeds to be applied in liquidation of the account existing between the forwarding bank and the Bank of America. This case is one where the draft in question bore a general endorsement, but accompanied by a letter saying "for collection and credit," and so far as the extensive opinion of the court goes, no other notice was given to the Bank of America. Nevertheless the court properly holds, that the Bank of America took the draft in question with *notice*. The value given was necessarily an antecedent value in that case, but the Negotiable Instruments Law was then in effect in the State of New York, and by its terms, antecedent value is considered as value with respect to the holder of a negotiable instrument. The case is furthermore made a strong one by reason of the fact that the credit given was not the usual provisional credit, but was one by the very terms of the agreement of which the Bank of America had the express right to retain for itself all the proceeds of the collection. In that respect

the relation between the banks made a much stronger case on the part of the Bank of America than is made in this case by the Portland Bank.

Lawrence v. Stonington Bank, 6 Conn. 521.

This is a case where collateral instructions for collection and credit accompanied a negotiable instrument bearing a blank endorsement, and the principles involved are identical to those contended for by the plaintiff in error in the case at bar.

Commercial Bank v. State Bank, 132 Iowa, 706; 109 N. W. 198.

Respecting the matter of giving value, we respectfully insist that this case is directly in point. A certificate of deposit given by the defendant bank, and payable on demand, was deposited in the Buck Grove Bank by its holder. It bore a blank endorsement, but was deposited for collection. The Buck Grove Bank forwarded this certificate to the Dow City Bank and by the Dow City Bank it was forwarded to the plaintiff bank in Council Bluffs. In each case provisional credit was given. Upon the failure of the forwarding bank, the Council Bluffs bank sought to avail itself of the beneficial interest in this certificate, and upon the refusal to pay the same by the defendant bank, the Council Bluffs bank brought its action. The court holds three things, namely: that the certificate of deposit payable on demand was a negotiable instrument; that the

giving of antecedent value by the Council Bluffs bank *was a giving of value* within the meaning of the Negotiable Instruments Law; *that the giving of provisional credit,* that is, credit with the right to charge back in the event of non-collection, *was not a giving of value,* and therefore the Council Bluffs bank never became purchasers of the check, thereby reversing the trial court.

It is stated in the opinion of this court that the plaintiff in error's cases are easily distinguishable from the facts of the case at bar. If these four cases upon which we rely, and upon which we relied in our brief, are properly distinguishable from the facts of the case at bar, we submit our inability so to distinguish.

It is very true that *Evansville Bank v. German American Bank,* 155 U. S. 556, is a case which goes further in our direction than the facts in the case at bar, in that there was a special form of endorsement. That case was cited not as covering the entire facts of this case, but as showing the interpretation given the words "for collection."

We know of no case in the Supreme Court of the United States where the effect of a collateral instruction accompanying a check endorsed either in blank, or by general endorsement, or wherein the matter of provisional credit given co-incident with such instructions, has been adjudicated. No case cited by the defendant in error completely covers the facts of this case, because they show facts where the check had either been collected, or the trust duty imposed by the instructions otherwise performed.

Finally, we are constrained to remark that our contention with respect to the amount of judgment seems to be misconceived by the court. If, as the court says early in its statement of facts, the interpretation to be given the letter "for collection and credit" is that credit be given after collection, it must follow that an agency was established to collect and then credit. No negotiations of purchase succeeded that agency relation. If there be any right of recovery on the part of the defendant in error, we respectfully submit that that recovery can only be in the nature of a recovery of the amounts that have been advanced to the benefit of the La Grande Bank by the Portland Bank, and that the true basis of such recovery must lie in money had and received. That being true, the defendant in error can recover no more than it actually paid out.

We do not claim as our basis for a reduction in the amount of judgment that our rights are exclusively those of a trustee because of fraud, although we respectfully insist that we have that right as well.

In view of the seeming misconceptions of the plaintiff in error's arguments, we respectfully petition this court to the end that a rehearing may be granted.

SNOW & McCAMANT,
GEO. B. GUTHRIE,
For Plaintiff in Error.

ince presenting the petition for re
ing, the question has arisen in the minds of
counsel whether or not an endorsement "Pay to
any bank or banker" is sufficient to pass titl
to the check, or creates a mere agency for col-
lection. In the main brief and in this petiti
such an endorsement is spoken of as a "general
endorsement", and reliance was placed on
that an agency to collect merely was cre
the letter accompanying the check from the Ma
Grande Bank to the United States National. It
submitted, however, that

...

...ALDWIN BY C. C. ... "PAY TO ANY BANK OR BANKER" IS ... CHECK INTO ... AND CREATES ONLY AN AGENCY ... THE CHECK.

...nk of ...nd. Nor. v. First National ... 3 L. R. Rep. (No.) 37.

...he facts in the cited case are: ... drew a draft payable to the plaintiff bank, ... ceived credit therefor, and drew against the ... credit. The plaintiff ... indorsed the ... with an endorsement "Pay to any bank or banker ... or order", and through successive endorsements ... of this character the paper reached the defend... bank. The defendant bank presented the draft ... payment to the drawee, who paid it with their ... check. The next morning, the drawee having ... discovered that the drawer ... draft ... cided, stopped payment ... check, ... course the drawee's check was returned, the dr... which had been surrendered, was taken up and returned to the plaintiff bank.

The action ... the plaintiff bank ... the defendant bank is not quite clearly disclo... but probably was an action for money had and

Finally, we are constrained to remark that our contention with respect to the amount of judgment seems to be misconceived by the court. If, as the court says early in its statement of facts, the interpretation to be given the letter "for collection and credit" so that credit be given after collection, it must follow that an agency was established to collect and then credit. No negotiations of purchase [illegible] that [illegible] relation. If there be any right of recovery on the part of the defendant in error, we respectfully submit that final recovery can only be in the nature of a recovery of the amounts that have been advanced to the benefit of the La Grange Bank by the Portland Bank, and that the true basis of such recovery must lie in money had and received. That being true, the defendant in error can recover no more than it actually paid out.

We do not claim as our basis for a reduction in the amount of judgment that our rights are exclusively those of a trustee because of fraud, although we respectfully insist that we have that right as well.

In view of the seeming misconceptions of the plaintiff in error's argument, we respectfully petition this court to the end that a rehearing may be granted.

SNOW & McCAMANT,

[illegible],

For Plaintiff in Error.

Distr

received, or an action for having accepted a check of drawee instead of money in payment for draft. Plaintiff was held entitled to recover. It contended by the defendant bank that the plaintiff was not the owner of the check in question, but that the Union National Bank of Kansas City, Mo., was the owner, through which bank, in part, the check had passed in its rounds for collection. The endorsement by the Kansas City Bank from the bank to whom the plaintiff had endorsed the check was as follows: "Pay to Union National Bank of Kansas City, Missouri, or order. Previous endorsements guaranteed." And it was contended by the defendant that this character of endorsement vested title in the check to the Kansas City Bank. The Court of Appeals of Missouri, however, held that the plaintiff bank, being the original payee of the draft, had endorsed the draft "Pay to any bank or banker", the bank to whom it was delivered in turn endorsing it to the Union National Bank of Kansas City with the character of endorsement referred to, and that being thus the original holder of the draft and endorsing it over "Pay to any bank or banker" was a restrictive endorsement and did not pass title to the check so that the Union National Bank of Kansas City could secure any title.

It is submitted by the plaintiff in error in this case, then, that not only the nature of the endorsement over to the United States National Bank but the letter accompanying the check created in the United States National Bank an agency for collection merely.

Zera Snow,
For Plaintiff in Error.

District of Oregon: ss.

This is to certify that I, Zera Snow, am one of the plaintiff in error's attorneys, that in my opinion the foregoing petition for a rehearing is well grounded in law and that the same is not interposed for purposes of delay.

ZERA SNOW,
Of Attorneys for Plaintiff in Error.

Dated June 15, 1911.